

**LAW, SOCIETY, AND JUDICIAL POLITICS: STATE SUPREME COURTS AND THE
PURSUIT OF EDUCATIONAL EQUITY**

by

Oliver Lee Bateman

BA, University of North Carolina at Chapel Hill, 2001

JD, Valparaiso University School of Law, 2007

MA, University of Pittsburgh, 2009

Submitted to the Graduate Faculty of the
Dietrich School of Arts and Sciences in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

University of Pittsburgh

2012

UNIVERSITY OF PITTSBURGH
DIETRICH SCHOOL OF ARTS AND SCIENCES

This dissertation was presented

by

Oliver Lee Bateman

It was defended on

April 6, 2012

and approved by

Chris W. Bonneau, Associate Professor, Department of Political Science

Janelle Greenberg, Professor, Department of History

Peter Karsten, Professor, Department of History

Edward K. Muller, Professor, Department of History

Dissertation Advisor: Peter Karsten, Professor, Department of History

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Oliver Lee Bateman, MA, JD, PhD

University of Pittsburgh, 2012

Since the late 1970s, state supreme courts have demonstrated an increased willingness to intervene in disputes on a host of issues ranging from defamation to budget deficits. Activists of all stripes now pursue their agendas in the context of what Richard Nixon dubbed the “New Federalism,” and education reform—a function traditionally handled by state and local governments—has occupied much of their attention. While a considerable amount of academic work has focused quite narrowly on either education policy or supreme court decision-making, few scholars have yet examined the intersection between the two; i.e., how have state and federal judges *made* education policy, and what *reasons* have they provided to justify their actions. For historians of education, law enters this story only peripherally as they focus on matters such as test scores and physical plant investments. Legal historians analyze the *ratio decidendi* on which each decision was based, trying to determine whether a particular constitutional clause or juridical argument impelled the result.

However, the complex and evolving relationship between race and class—seemingly indissoluble in the American setting—that plays out in the context of these school funding disputes cannot be captured by a single method of analysis or monocausal explanation. By placing state supreme court decisions on school finance from the late 20th century in the context of constitutional framing and caselaw from the 19th, and weaving together judicial opinions, lawyers’ pleadings, law review articles, and transcripts of interviews with state supreme court

justices and appellate lawyers, I hope to produce a detailed history of legal conflicts over school funding that will fill any extant lacunae. As policymakers at the state level attempt to forge more socioeconomically equitable and racially inclusive systems of education, it behooves them to contemplate the haphazard, contentious, and at times fructifying nature of these highly politicized judicial decisions.

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ACKNOWLEDGEMENTS

In the course of writing this dissertation, I have incurred many debts. The first and most obvious debt is to my advisor, Peter Karsten, who has helped to shape both the contours of my research and my approach to teaching US history. Much of what is good in here originated during conversations with him; the errors and omissions are, of course, my own.

While at the University of Pittsburgh, I was fortunate to take several courses with Janelle Greenberg and one with Chris Bonneau; both individuals have provided me with extremely useful frameworks for “doing” legal studies. Edward Muller has read a great deal of what I’ve written and provided much valuable feedback, as have my good friends Brian Shaev and Nathan Zimmerman. Erik Hinton, who currently works as a graphic artist at *The New York Times*, took time out of his busy schedule to assist me with the layout and design of the maps that appear in the concluding chapter. After aiding me with my job search during the fall, Julien Comte showed me how to format my dissertation for ETD upload—no easy feat for someone as ignorant of Microsoft Word’s capacities as I. Although I was not her advisee, Lara Putnam went out of her way each semester to offer counsel regarding my professional development. Bruce Venarde, Seymour Drescher, Marcus Rediker, Rob Ruck, Van Beck Hall, Evelyn Rawksi, and Jonathan Scott have all contributed to my evolution as a historian, and I am grateful to them for that.

I have received generous financial assistance for this project from a variety of sources. The Dietrich College of Arts and Sciences at the University of Pittsburgh awarded me a Mellon Fellowship for the 2011-2012 school year. The American Historical Association gave me a Littleton-Griswold Research Grant for summer 2011. The Department of History awarded me a C. Y. Hsu Summer Research Grant and also intended to subsidize my research and writing in 2012-2013, nominating me for a Lillian B. Lawler Fellowship that circumstances have necessitated I decline.

1.0 INTRODUCTION

Since the late 1970s, state supreme courts have demonstrated an increased willingness to intervene in disputes on a host of issues ranging from defamation to budget deficits. Activists of all stripes now pursue their agendas in the context of what Richard Nixon dubbed the “New Federalism,” and education reform—a function traditionally handled by state and local governments—has occupied much of their attention. While a considerable amount of academic work has focused quite narrowly on either education policy or supreme court decision-making, few scholars have yet examined the intersection between the two; i.e., how have state and federal judges *made* education policy, and what have they written to justify their actions. For historians of education, law enters the story only peripherally as they focus on matters such as test scores and physical plant investments. Legal historians analyze the *ratio decidendi* on which each decision was based, trying to determine whether a particular constitutional clause or juridical argument impelled the result.

However, the complex and evolving relationship between race and class—seemingly indissoluble in the American setting—that plays out in the context of these school funding disputes cannot be captured by a single method of analysis or monocausal explanation. By weaving together judicial opinions, lawyers’ pleadings, law review articles, and transcripts of interviews with state supreme court justices and appellate lawyers, I hope to produce a detailed history of legal conflicts over school funding that will fill any extant lacunae. As policymakers

at the state level attempt to forge more socioeconomically equitable and racially inclusive systems of education, it behooves them to contemplate the haphazard, contentious, and at times fructifying nature of these highly politicized judicial decisions.

State supreme court oversight of education policy increased in the wake of a controversial 1973 Supreme Court decision. This case, *San Antonio Independent School District v. Rodriguez*, presented the Supreme Court with the opportunity to determine the constitutionality of property tax funding of public schools. In justifying its decision, the Burger Court held that this policy did not violate the Equal Protection Clause because poverty was not a suspect class and public education was not a right implicitly or explicitly protected in the Constitution. Had the Court's 5-4 vote gone in the other direction, fifty states would have been required to restructure their school funding systems to achieve some rough measure of federally-mandated parity. Because the *Rodriguez* majority did not impose such a federal standard, nearly every state's supreme court has grappled with education finance litigation.

Here is how I intend to organize this narrative. In the second chapter, I examine earlier issues in state school funding, beginning with a discussion of the federal government's early involvement in education finance by means of the Northwest Ordinance of 1787 and other subsequent pieces of land grant legislation. From there, I explore subsequent 19th century efforts at constitutional ordering that were resolved by the addition or subtraction of education clause language to state constitutions, culminating with a discussion of the constitutional re-framing of public education that occurred in the American South after the end of Reconstruction.

Even as states in the North and West chose to continue expanding access to their public school systems, others—notably those states that comprised the Confederacy, as well as “near-South”

border states such as Missouri and West Virginia—added language to their constitutions that mandated segregation.

In the third chapter, I demonstrate how these restrictive methods of constitutional framing precipitated a school funding crisis of considerable magnitude throughout the South and “near-South”—a crisis that, far from improving, actually worsened with the passage of time. I proceed from a discussion of these disparities to an analysis of how the NAACP litigation team’s strategy of challenging the prevailing “separate but equal” doctrine succeeded in considerable part because these “separate” institutions were so poorly funded. In the next section of this chapter, I continue to explicitly link notions of race and class—arguing for their fundamental conceptual inseparability—in the context of the US Supreme Court’s 1973 milestone school funding decision in *Rodriguez* as well as the school funding litigation that commenced at the state level afterwards. The third section considers school finance litigation that occurred after 1989, a year when many scholars believe that a decision by the Kentucky Supreme Court shifted the nature of the judiciary’s involvement in these matters, making state supreme courts more amenable to siding with plaintiffs. While conceding that plaintiffs have altered their litigation strategies and that there were indeed notable successes in terms of school finance reform in states such as Massachusetts and Vermont over this period, I also draw attention to plaintiffs’ defeats in Illinois and Pennsylvania—where the nineteenth-century interpretation of these education clauses remains the preferred interpretation of those courts—as well as a convoluted, voter-led movement for constitutional reform in Florida that has so far yielded few practical results. Finally, I close the chapter by discussing a Connecticut case where, for the first time in the history of this process, a majority of justices on a state supreme court agreed that, with regard to school funding disparities in their state, race and class were inseparably linked

Chapter four consists of my analysis of the *DeRolph* series of decisions in Ohio, presented here as a representative case study in school finance litigation that occurred in what is considered by many pundits to be “America’s most representative state.” Relying on interviews with principals to the litigation and enhanced by the inclusion of more primary sources and a new section on *DeRolph*’s salience—or lack thereof—in one especially fiercely-contested judicial election, this section enables me to better illustrate prior examples and claims about the judicial politics of education finance litigation while also demonstrating the vitality and utility of a “law and society” approach to exploring the sometimes-fraught relationship among judges, legislators, governors, interest group leaders, and other arbiters of public opinion.

My final chapter offers a capstone to the narrative, examining the status of school finance litigation at the outset of the 21st century. I give special attention to New Jersey Governor Chris Christie’s conflict with the New Jersey Supreme Court in the wake of the twenty-first decision in the ongoing *Abbott v. Burke* saga, a series of opinions in which the court held that the New Jersey government must provide additional funding to thirty-one “at-risk” school districts. From there, I scrutinize the continuing relevance of race to the school funding narrative, linking the actions of the late 19th century “Redeemer Democrat” legislatures of the American South with a failed effort to amend the segregationist language of Alabama’s education clause and thereafter commenting on the implicitly race-based and impossible-to-ignore funding disparities that have been exacerbated in metropolitan areas such as Seattle and Los Angeles in the wake of the 2007 U.S. Supreme Court decision *Parents Involved in Community Schools v. Seattle School District No. 1*. In my concluding remarks, I evaluate recommendations made by other scholars regarding the proper approach to resolving school finance inequalities through the courts. After assessing

these recommendations, I close with one of my own: an amendment to the federal constitution that would create a nationwide “unitary” school system.

2.0 AN OVERVIEW OF THE DEVELOPMENT AND INTERPRETATION OF CERTAIN PROVISIONS FOR EDUCATION FOUND IN STATE CONSTITUTIONS, 1800-1900

In *Brown v. Board of Education*, Chief Justice Earl Warren, writing for a unanimous Supreme Court, waxed rhapsodic about the role of public education in American life. After noting that it was “perhaps the most important function of state and local governments,” he went on to observe that “it is the very foundation of good citizenship...[and] a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹ It is with the first part of Warren’s declaration that this chapter is concerned. I investigate how education came to be the “most important function” of state and local governments. How did legislators who remained generally distrustful of government intervention—state, federal, or otherwise—accede to the creation of an extensive network of publicly-funded schools? And in what ways and to what extent did the framing and reframing of these subnational constitutions affirm, embody, and actualize this function?

To answer these questions, I have organized this chapter into three sections. The first section examines the earliest attempts at including provisions related to education in state constitutions. The aim here is twofold: first, to illustrate how these earliest provisions, regardless of wording (or re-wording, as the case may be), created no enforceable legal rights

¹ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

and duties; and second, to show how one notable court of the era, the Massachusetts Supreme Court, twice interpreted its constitutional provision in exactly that manner.

The second section concerns the flurry of constitutional re-framing that occurred in the middle of the 19th century. Encouraged and assisted by education policy experts who were participating in a transatlantic conversation about school reform, numerous states added language to their state constitutions mandating the implementation of public school systems that would be “free,” “thorough,” “efficient,” “uniform,” and “open.” However, these educational provisions—although quite different in their content than the provisions addressed in section one—still offered scant guidance to jurists forced to decide questions relating to the funding and composition of the public schools in their states. The substantive reforms that did occur in the states of the North and the Middle West—enforcement of “free schooling,” admission of African-Americans and other minorities to public schools—during this period came through legislation, not constitutional convention or judicial decision.

The final section examines the period from the Civil War to the end of the 20th century—an era that, owing to extremely exigent circumstances, witnessed as much contradictory, confused, and paradoxical constitutional re-framing as any in the nation’s history. For many Northern and Western states, the long process of expanding access to the public schools continued. In the South, states such as Louisiana and South Carolina first amended their constitutions to expand access to public education, allowing for the operation of integrated schools. Then, with the close of the Reconstruction and the ascent of “Redeemer” Democratic administrations throughout the South, the region’s state constitutions were amended to formally segregate the schools. Unable to avail themselves of judicial assistance of any sort from the

Supreme Court or their respective state supreme courts, African-Americans living in those states would soon find themselves in failing, chronically under-funded, or simply inoperative schools.

2.1 CONSTITUTIONAL FRAMING FROM THE REVOLUTIONARY WAR TO THE ERA OF GOOD FEELINGS: EARLY FEDERAL AND STATE PROVISIONS FOR EDUCATION, 1776-1815

Many of the intellectuals who formed America's so-called "founding generation" harbored strong views about the nexus between a well-educated populace and the preservation of "Republican virtue." Of course, these intellectuals also often espoused equally strong sentiments about the necessity of maintaining republican political structures and rights. For example, Thomas Jefferson, who viewed only "the people themselves...[as a] safe depository of rights"² and thus a group whose discretion should be informed by discretion, also believed that the government should not "wast[e] the labors of the people, under the pretence of taking care of them."³ In spite of the latter remark, he also wrote of the need for Virginia to include language in its state constitution respecting public education: "An amendment of our constitution must here come in aid of the public education...[because] the influence over government must be

² As quoted in Gordon C. Lee, ed., *Crusade Against Ignorance: Thomas Jefferson on Education* (New York, 1961), p. 100.

³ Thomas Jefferson to Thomas Cooper, letter of November 29, 1802. This passage is frequently misquoted, both by biographers as well as the anonymous authors of chain e-mails, as follows: "If we can prevent the government from wasting the labors of the people, under the pretence of taking care of them, they must become happy."

shared among all the people.”⁴ Federalists such as future Supreme Court Justice Joseph Story and John Adams also believed that, in the absence of a new “science” of civic education that would effect a “memorable change...in the system of education and knowledge [that will] become so general as to raise the lower ranks of society nearer to the higher,” the great body of Americans would be slow to slough off pre-revolutionary attitudes.⁵

It should not come as a surprise, then, that the nascent federal government involved itself in the construction of a system of common schools. Nor, for that matter, should the nature of the involvement: the Ordinance of 1785, which specified the basic terms by which the lands further delineated in the Northwest Ordinance of 1787 were to be settled, included among its provisions a “reservation” of a section of each township—“section 16” in the original language, “section 36” in later-admitted states—which could be used as land for a school or sold to subsidize the construction and operation of one.⁶

In this way, as Daniel Feller has observed, the federal government could direct “developmental priorities in a diverse and rapidly expanding union.”⁷ And, as the area then defined as the “West” came to be settled, “territorial settlers came increasingly to regard land grants for education as an entitlement [rather than] a bargaining chip.”⁸ Congressional policy with regard to state education in the early 19th century, then, was not entirely dissimilar to its present-day equivalent: a sort of “give-and-take,” whereby residents of states and territories

⁴ Jefferson, *Notes on the State of Virginia* (1784), pp. 146-149. Accessed at <http://press-pubs.uchicago.edu/founders/documents/v1ch18s16.html>.

⁵ David B. Tyack, “Forming the National Character: Paradox in the Educational Thought of the Revolutionary Generation,” 36 *Harvard Educational Review*, pp. 29-41 (1966); John Adams, as quoted in David McCullough, *John Adams* (Simon & Schuster, 2001), p. 364. As Tyack notes repeatedly throughout his article, this “science” or “business” of civic education meant something rather different to each person who propounded it.

⁶ 28 Journal of the Continental Congress 375 (1785). Accessed from <http://memory.loc.gov/cgi-bin/ampage?collId=lljc&fileName=028/lljc028.db&recNum=386>.

⁷ Daniel Feller, *The Public Lands in Jacksonian Politics* (Madison, 1984), pp. 5-6.

⁸ David Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education 1785-1954* (Madison, 1987), p. 34.

found themselves petitioning Congress for grants of additional “reserved” acreage which could thereafter be sold to offset the cost of internal improvements.⁹

State representatives had, from the founding of the United States, recognized education to be a public function of some level of importance. During the period from the drafting of the Declaration of Independence to the Philadelphia Convention, eleven of the original thirteen states adopted constitutions, and five of them included provisions related to education.¹⁰ These provisions were a mixed bag: some were grandiose, some mentioned universities and elementary schools in the same breath (and then only in passing), and only the Pennsylvania Constitution of 1790 contained a statement explicitly providing for free education.¹¹

By 1800, twenty-five constitutions had been adopted or revised—the constant revision of these documents is a recurrent theme of subnational constitutional framing—with twelve containing educational provisions of some sort.¹² Although these provisions were not themselves the subject of direct litigation until the 1820s, they do appear to have had two specific methods of operation. The first, perhaps best exemplified by the lofty language composed by John Adams for the Massachusetts Constitution of 1780, seems designed merely as an exhortation to legislators and other lawmakers rather than a direct order for specific performance:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these

⁹ Fletcher H. Swift, *A History of Public Permanent School Funds in the United States* (New York, 1911), pp. 59-65.

¹⁰ Rhode island and Connecticut continued to operate under colonial charters that had been revised only slightly.

¹¹ *The Federal and State Constitutions* (Francis N. Thorpe, ed., 1909) was the reference used for examining many of the constitutional provisions mentioned in this section. Various quotations from the state conventions, as noted by volume and page, are drawn from *State Constitutional Conventions from Independence to the Completion of the Present Union* (Cynthia E. Browne, compiler, 1973), a microfiche collection accessed at the Library of Congress, or via GoogleBooks.

¹² This represented seven of the sixteen States then in the Union, with several constitutions being counted twice: Pennsylvania (1776, 1790); North Carolina (1776); Georgia (1777 and 1798); Massachusetts (1780); New Hampshire (1784 and 1792).

depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people.¹³

The intended effect of this provision—if an account included in Adams’ collected writings is any guide—was to provide grounds for chartering the American Academy of Arts and Sciences, and the rest of the language was filler that had been inserted in “good humor.”¹⁴

When first called upon to interpret this provision in *Commonwealth v. Dedham* (1819)—a case concerned with the certificates and qualifications a schoolmaster must present prior to his employment in a “grammar school”—the Massachusetts Supreme Court, per Justice Samuel Wilde, observed that common schools, if operated at all, should “be maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges, for the education of their children in the public schools.”¹⁵ The holding in the case was narrowly related to what constituted a “license” to teach under an early Massachusetts statute, but Wilde also offered a statement regarding public education that has been echoed by many American courts down to the present: “it is [not] in the power of the majority to deprive the minority of its privilege...[for] every inhabitant of the town has a right to participate in the benefits of both

¹³ Massachusetts Constitution of 1780, Part the Second, chapter V, § 2. This provision is still in the Massachusetts Constitution and, except for an amendment to it passed in 1855 barring state assistance to religious institutions (a common practice in that period), remains largely unchanged. However, owing to the decision *McDuffy v. Secretary* (1993) that is discussed in both chapter three and chapter five, it is now interpreted in a radically different manner than its framers had intended.

¹⁴ Charles F. Adams, *Ed’s note*, in 4 *The Works of John Adams* 259-261 (n.1).

¹⁵ *Commonwealth v. Dedham*, 16 Massachusetts 141 (1819).

descriptions of schools...and it is not competent for a town to establish a grammar school for the one part of the town, to the exclusion of the other.”¹⁶ Thus, if schools of one particular kind—here described as “grammar schools”—are maintained in a district, students cannot be prohibited from attending them, or sent to clearly inferior or “different” schools within that district. Wilde, then, was concerned with intra-district equality, much as the justices in the majority in the much-later *Milliken v. Bradley* decision were.¹⁷

However, Wilde’s opinion is silent on two other matters related to the operation of the state’s education clause: Must municipalities maintain public schools at all? And, if there are multiple schools of the same “kind” within a district, does a student have a right to attend the public school nearest his or her home? These two issues were at contest in an 1849 action on the case brought by Sarah Roberts, a school-age African-American girl from Boston whose parents wanted her to attend a neighborhood grammar school rather than a grammar school for “colored” students that was maintained rather more distantly from her home. Noted abolitionist and statesman Charles Sumner agreed to represent her and her family in this litigation, bringing suit under a Massachusetts statute which provided that “any child, unlawfully excluded from public school instruction, in [the] Commonwealth, shall recover damages therefor.”¹⁸ Sumner’s argument before that court highlighted various Massachusetts constitutional principles, most notably that “all men, without distinction of color or race, are equal before the law.”¹⁹ He also cited *Dedham* as a controlling precedent, noting that “the courts of Massachusetts have never

¹⁶ *id.* at 146.

¹⁷ *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that, absent clear and convincing evidence of discriminatory intent on the part of districts outside of Detroit, a “bussing” remedy was limited to the area within the target district). Due to the risk of anachronism, of course, this comparison should not be taken too far.

¹⁸ An Act Concerning Public Schools, ch. 214, 1845 Massachusetts Session Laws 545.

¹⁹ *Roberts v. Boston*, 59 Massachusetts 198 (1849). The quote that appears in the text was based on Sumner’s reading of Articles I and VI from Part the First of the Massachusetts Constitution of 1780, which concerned the equality of all men under the law.

admitted any discrimination, founded on color or race, in the administration of the common schools, but have recognized the equal rights of all the inhabitants.”²⁰ In the course of presenting his argument, however, Sumner made no explicit mention of Adams’ hortatory provision in the Massachusetts Constitution.

Chief Justice Lemuel Shaw, writing for the court, reaffirmed that “persons of African descent” were indeed “entitled by law, in this commonwealth, to equal rights, civil and social.”²¹ He then sought to “ascertain what are the rights of the individuals, in regard to the schools,” concluding that the municipalities have “plenary authority” to organize their common schools as they see fit.²² Based on his reading of the statutes—which provide the framework by which the schools are to be organized and operated—as well as the constitution, individuals had no “right” to education: “What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions.”²³ In other words, it was left to state and local legislators to determine the parameters of their systems of education. As for Roberts’ statutory claim, it failed on its face: there was a “colored” school in operation within the city limits, and a walk across Boston would—in Shaw’s view—“be scarcely an inconvenience to require a boy of good health to traverse daily the whole extent of it.”²⁴ Racial prejudice—opposition to the existence of which had motivated Sumner to represent Roberts—was “not created by law, and probably cannot be changed by law.”²⁵

²⁰ *id.*

²¹ *id.*

²² *id.*

²³ *id.*

²⁴ *id.*

²⁵ *id.*

However distasteful to modern sensibilities it seems, Shaw's reading of the Massachusetts Constitution was not without substantial legal justification. Other early constitutional provisions, though, seem to contain language imposing an affirmative duty on state legislatures to establish and oversee a system of public schools:

That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.²⁶

This passage, found in the North Carolina Constitution of 1776, was echoed in the Pennsylvania Constitution of 1776 (“a school or schools shall be established in each county by legislature...”) and the Vermont Constitution of 1777 (“a school or schools shall be established in each town...[and] one grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly”).²⁷ The provision in the Georgia Constitution of 1777 was written in language firmer still: “Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”²⁸

The firmness of this language aside, it took the legislatures in all four of these states quite some time to pass legislation relating to the establishment of public schools. The Pennsylvania legislature's only notable enactment regarding public education in the late 18th and early 19th centuries involved revoking the charter of the College of Philadelphia in order to charter the University of the State of Pennsylvania, and it established no schools of any kind until after the Constitution of 1790.²⁹ Perhaps owing to these delays, such obligatory language was softened

²⁶ North Carolina Constitution of 1776, art. XLI.

²⁷ Pennsylvania Constitution of 1776, § 44; Vermont Constitution of 1777, § 40.

²⁸ Georgia Constitution of 1777, art. LIV.

²⁹ Louise G. Walsh and Matthew J. Walsh, *History and Organization of Education in Pennsylvania*, p. 85 (1930). However, according to 12 Statutes at Large of Pennsylvania 1682 to 1801 224, Act of April 7, 1786, ch. 724 § 7, the government did reserve a small amount of state-owned lands for endowing schools, but—per Walsh and Walsh, pp. 85-86—no schools were established by the legislature prior to the rewriting of the state constitution in 1790.

not long after it had been adopted. The education clause in Vermont's 1786 and 1793 Constitutions was amended to read "schools ought to be maintained," while in 1790 Pennsylvania added "as soon as conveniently may be" after "shall be established."³⁰ The Pennsylvania Constitution of 1790 was notable in that it provided for free education—the first such constitution in the United States to do so—but only for people defined as "poor." This proved tremendously difficult to implement, given that parents had to be designated by a local administrator as "paupers" before the children could receive free schooling. A subsequent attempt in 1824 to clarify the law to provide education to a greater number of students met with opposition—again due to its cost—and a complete system of free public schools was not established in Pennsylvania until 1834.³¹

Although North Carolina and Georgia were alone among the South Atlantic states in inserting provisions regarding education in their constitutions, it would be many years before any legislative action was taken in pursuit of these objectives."³² And this is in itself something of an understatement: North Carolina established its system of common schools in 1839³³, and Georgia did not provide regular funding for its system of public schools until 1873.³⁴ Prior to 1873, it was left to Georgia's towns and cities to provide education to their residents, albeit with support from a meager "poor school fund" created in 1822. It was not until 1866 that Georgia's

³⁰ Vermont Constitution of 1786, ch. II, § 38; Vermont Constitution of 1793, ch. II, § 41; Pennsylvania Constitution of 1790, art. VII, § 1.

³¹ Walsh and Walsh, *History and Organization of Education in Pennsylvania*, pp. 95-96, 119. See also "Records of the Department of Education Agency History," accessed at <http://www.phmc.state.pa.us/bah/dam/rg/r22ahr.htm>, as well as Jacob Tanger and Harold Alderfer, *Pennsylvania Government, State and Local* (1939), p. 281.

³² Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776-1860* (Chapel Hill, 1930), p. 95.

³³ "History of the North Carolina State Board of Education," accessed at <http://www.dpi.state.nc.us/stateboard/about/history/chapters/one>. This law—similar to others that were being passed at the time in places such as Ohio—"established the principle of combined State and local funding for public schools."

³⁴ "Public Education" in *The New Georgia Encyclopedia*. Accessed at <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2619>.

legislature approved a bill creating a statewide system of free public schools, as an earlier bill—passed in 1837—had been almost immediately repealed due to intense public opposition rooted in anxiety over its purported costs. Even after the passage of that 1866 bill, the state school system did not come into actual existence until 1873, when the state allocated revenues to it that were sufficient to subsidize its operation—at which point it was totally segregated by race.³⁵

Thus, while there were two forms of education clause to be found in the state constitutions of the late 18th century—hortatory provisions and facially obligatory provisions—it appears that this amounts to a “distinction without a difference.” Vermont, Georgia, Pennsylvania, North Carolina did not face litigation of the sort that the Massachusetts Supreme Court grappled with in *Roberts*—although issues of access and cost were certainly not far from the thoughts of legislators who continually attempted to reform (and, in some cases, “re-form”) systems of public education in these states. Assuming that they had, however, it is unlikely that they would have returned a result different from the one reached by Shaw and his colleagues. Indeed, even putting aside the judicial innovations of the age—and there were many—“an element of conservatism,” as the Massachusetts attorney Rufus Choate put it, pervaded the bar. Certainly no “fundamental right” to education could have been announced during this period—not by jurists, more than a few of whom refused to view law as “the transient and arbitrary creation of the majority will.”³⁶ It had been left, and would continue to be left until well into the 20th century, to the state legislatures to effect any and all reforms appertaining to public education.

³⁵ *id.*

³⁶ Rufus Choate, as quoted in William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (Oxford, 1998).

2.2 OPENING THE FRAME: EDUCATING THE “COMMON MAN” IN THE EARLY AND MID NINETEENTH CENTURY, 1800-1865

As additional states were admitted to the Union—eight between 1803 and 1821—six of them adopted provisions relating to education that were modeled on either the language found in the Northwest Ordinance (“schools and means of education shall forever be encouraged”³⁷) or the Massachusetts Constitution of 1780.³⁸ Moreover, as these territories were admitted to statehood, they added provisions to their constitutions related to the care and maintenance of the school lands granted to them by the federal government.³⁹ In its Constitution of 1835, Michigan adopted an education provision, based on the revenues from this “common fund” of donated lands—that for the first time appeared to contain a genuine enforcement provision:

The legislature shall provide for a system of common schools, by which a school shall be kept up and supported in each school-district at least three months in every year; and any school-district neglecting to keep up and support such a school may be deprived of its equal proportion of the interest of the public fund.⁴⁰

On the surface, this provision appears to do two things. First, it couples the requirement that the “legislature shall provide for a system of common schools”—language seen in earlier education provisions—with a specific command that “a school shall be kept up in each school-district at least three months every year.” Second, it contains a penalty for districts that fail to do so, which would be an inability to partake in the revenues produced by the public fund created by land grants from the Northwest Ordinance. However, as John Eastman pointed out in a study of this provision, the primary motivation for that precise language was owing to the fact that “the funds

³⁷ Northwest Territory Ordinance Article III, § 14 (1787); 1 Stat. 51.

³⁸ The Ohio Constitution of 1802, the Mississippi Constitutions of 1817 and 1832, and the Alabama Constitution of 1819 adopted the language of the former. The Indiana Constitution of 1816, the Maine Constitution of 1819, and the Tennessee Constitution of 1834 borrowed the language of the latter.

³⁹ e.g., Indiana Constitution of 1816, art. IX, § 2 and Missouri Constitution of 1820, art. VI, § 1.

⁴⁰ Michigan Constitution of 1835, art. IX, § 2.

were...a source of temptation for the legislature, and an obligatory provision of some kind was needed to keep the school fund from being spent elsewhere.”⁴¹ As such, “the clause was not intended to establish a right to free education or to compel the provision of education” but rather to provide a mechanism by which school districts that did not offer schooling for three months a year could be deprived of their share of the school fund.⁴² And this was exactly how one justice of the Michigan Supreme Court characterized that clause in an 1869 decision: “It cannot be claimed that the legislature could not make or authorize any regulation they should see fit, in regard to the management of different scholars.”⁴³

These provisions regarding public education funds would prove especially nettlesome during the middle part of the century, when financial crises—the Panic of 1837 most notable among them, although there were various other regional economic “busts” as well—forced states such as Michigan to borrow against the school funds that they had promised to preserve.⁴⁴ The fund itself experienced a significant setback, with purchasers of those school lands negotiating more favorable payment terms at the fund’s expense. In response, the state legislature legalized the practice of charging tuition to students, in the event that the fund became completely exhausted.⁴⁵ The quarrels of the ensuing years involved considerable public debate over the issue of taxation and school finance, with one of the main objectives of the Michigan Constitutional Convention of 1850 being to determine “how [public education] should be

⁴¹ John C. Eastman, “When Did Education Become a Civil Right?” 42 *American Journal of Legal History* 1 (1998). Eastman, a former law clerk for Justice Clarence Thomas, is an “originalist” who concludes that education became a “right” only when “activist” 20th century state supreme court justices began to declare it one.

⁴² *id.* at 14.

⁴³ *The People ex rel. Workman v. Board of Education of Detroit*, 18 Michigan 400, 418 (1869) (Campbell, J. dissenting). This majority opinion in this case, authored by Justice Thomas Cooley, will be discussed in greater detail later in this section.

⁴⁴ George W. Knight, “History of the Land Grants for Education in Michigan,” 7 *Report of the Pioneer Society of the State of Michigan* 17-35 (1884).

⁴⁵ David Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785-1954* (Madison, 1987), pp. 84-85.

financed and how prominent [was to be] the role of the state in comparison with that of local districts.”⁴⁶

Informing these debates over the role of the state in public education in Michigan as well as other “Western” states was an English translation of the French philosopher Victor Cousin’s *Report on the State of Public Instruction in Prussia* produced in 1834 by Sarah Austin.⁴⁷ After being translated and published in England, the work was soon being reprinted by the legislatures of New Jersey, Massachusetts, and New York and distributed to educators working in those states’ public schools.⁴⁸ The *Report* specified a method of organization for the educational bureaucracy, a program of teacher education, and emphasized the importance of compulsory primary education as a “civic duty.” Exposure to it prompted Ohio educator Calvin Stowe—of whom more is said in chapter three—to travel abroad and make his own report on European public schools for the Ohio legislature, and it also influenced Michigan lawmakers John Pierce and Isaac Crary to press their state’s legislature to organize their schools along Prussian lines.⁴⁹ After traveling back to the East to meet with like-minded education reformers, he returned to Michigan in 1837 with a plan that would utilize the public fund—already a subject of much controversy—to fashion a system of compulsory public education for children ranging from five to seventeen years of age. Staffed by qualified administrators and professionally trained teachers and subsidized by local property tax increases as well as the public fund,

⁴⁶ id.

⁴⁷ Victor Cousin (trans. Sarah Austin), *Report on the State of Public Instruction in Prussia* (London, 1834).

Accessed at

http://books.google.com/books/about/Report_on_the_state_of_public_instructio.html?id=BjidqK3qAUUC&utm_source=gb-gplus-share via the Library of the University of Michigan.

⁴⁸ “Cousin, Victor” in 1911 Encyclopedia Britannica. Accessed at

http://en.wikisource.org/wiki/1911_Encyclop%C3%A6dia_Britannica/Cousin,_Victor.

⁴⁹ John D. Pierce, “Origin and Progress of the Michigan School System,” 1 *Report of the Pioneer Society of the State of Michigan* 37 (1876). Also discussed, *passim*, in Tyack et al.

Pierce's plan was intended to "infallibly secure the interest of the great mass of the people in the welfare of the public schools."⁵⁰

Such a proposal was, of course, quite controversial in part because it promised to be quite expensive. And, setting aside the scholarship that influenced education policymakers during this period, the Michigan Constitutional Convention of 1850, in the words of David Tyack, "concerned not *ends* but *money*."⁵¹ That is, this convention—as well as the state's subsequent 1867⁵² and 1908 conventions—"showed the same disputing over means within a larger consensus over purposes that characterized state educational policy to 1850," with disagreements over the length of the school term and the costs of school finance remaining major, unresolved issues throughout that period. Although some delegates supported a version of Pierce's proposal for free schools supported by general taxes on all citizens, others worried about the dangers of centralization and the imposition of an oppressive financial burden on the public.⁵³

What emerged from the convention, then, was a compromise: the Constitution of 1850 would contain a clause mandating a system of free schools as well as a proviso giving the legislature five years to accomplish this.⁵⁴ This "free schools" provision comported with developments in states such as New Jersey, Ohio, and Oregon, which coupled such language with a requirement that these systems be "thorough and efficient."⁵⁵ Wisconsin's Constitution of 1848 and Minnesota's Constitution of 1857 went further than those three, both stating that these

⁵⁰ id. at 38.

⁵¹ Tyack et al. at 85 (emphasis added).

⁵² At the 1867 convention, the issue of compulsory education was again raised. In response, one delegate snappishly remarked "we do not live in Prussia." Debates and Proceedings of the Constitutional Convention of the State of Michigan, 1867, vol. I, pp. 304-308.

⁵³ id. at 304-308, 404-419.

⁵⁴ Michigan Constitution of 1850, art. XIII. Of the delegates that attended this convention, Tyack et al. report that "almost half were farmers, and the next largest group were lawyers" (p. 232). Only a handful identified as teachers.

⁵⁵ New Jersey Constitution of 1844, art. IV, § 7, pt. 6; Ohio Constitution of 1851, art. VI, § 2; Oregon Constitution of 1857, art. VIII, § 3. Of the genesis of art. VI, § 2 in the Ohio Constitution of 1851, much more is said in chapter four.

school systems—which should be “general and uniform”—would necessitate the establishment of “public schools in each township in the state.”⁵⁶ However, all of this constitutional language was simply not relevant to state supreme courts faced with the legislation of this period: As with the *Dedham* and *Roberts* cases in Massachusetts, the courts’ holdings turned on whatever statutes the legislatures had passed to “enable” this language—and even then the results occasionally went against the ostensible “plain text” of the statute at issue.

In *Van Camp v. Board of Education of Logan* (1859), the Ohio Supreme Court was faced with a set of facts that compelled just such a seemingly contradictory result: Enos Van Camp—the ancestry of whom was debated, although he referred to himself and the other members of his family as “white”—applied to have his children admitted to a public school that was partially subsidized out of the state’s public fund. The Board of Education of Logan, though receiving monies from the state, refused to admit them in spite of an 1853 Ohio statute that imposed an affirmative duty on the state’s school districts to educate both “white” and “colored” children together if they had no separate school for “coloreds.”⁵⁷ The Ohio Supreme Court, per Justice Peck, held that this statute—which seemed on its face to impel a result in Van Camp’s favor—was merely classificatory in nature, rather than one that required districts to educate all children, “white” and “colored,” living therein.⁵⁸ As for the lack of separate schools in Logan—like in other districts “in which the number [of African-Americans] is so limited...”, that was a “matter for the consideration of the legislature, and not for the judiciary.”⁵⁹ In Peck’s opinion, because

⁵⁶ Wisconsin Constitution of 1848, art. X, §§ 3-5; Minnesota Constitution of 1857, art. VIII, § 3. The former constitution also banned sectarian instruction in these schools, and stated that these district schools should operate “without charge” for residents living with the district.

⁵⁷ *Van Camp v. Board of Education of Logan*, 9 Ohio 406, 410 (1859). The opinion states that this man’s children were “five-eighths” white and “three-eighths” African, and were “distinctly colored and regard as colored children by the community where they reside,” at 409.

⁵⁸ *id.*

⁵⁹ *id.* at 415.

some schools were provided for “colored” students—at least somewhere in the state, if not in Logan—the law did not exclude them altogether from the “means of education.”⁶⁰ This was, one must conclude, an even harsher result than the holding in *Roberts*, where the Massachusetts Supreme Court indicated that Sarah Roberts would have been entitled to attend a “white” public school in her district if there were no schools for “coloreds.” Furthermore, no mention was made whatsoever of Article VI, Section 2 of the Ohio Constitution: regardless of how unjust this result seemed, the system of schools then established in Ohio was “thorough and efficient.” A fairer result for Van Camp, it seems, would be left to the legislature—which would itself have to pass a clearer, more unequivocal statement regarding access to public education.

Where such language was indeed unequivocal, plaintiffs seeking access to public education achieved more favorable results. New Jersey’s Constitution of 1844, which stated that the school fund should be “for the equal benefit of all people in the state,” was buttressed in 1874 by legislation that ordered public schools to be “open and free” to all students living within a given school district.⁶¹ Pierce, a biracial resident of the New Jersey city of Burlington, attempted to have his children admitted to the nearest public school in his district (which was a “white” school), and, after they were denied admission, sued the district’s school trustees to enforce the terms of the 1874 statute. Writing for a unanimous New Jersey Supreme Court in *Pierce v. Union School District* (1874), Justice Dixon announced that “the power of the legislature to enact the law which has been promulgated on the subject is indubitable” and thus the refusal to

⁶⁰ *id.*

⁶¹ *Pierce v. Union School District*, 46 N.J. (Vroom) Law Reports 76 (1874). Not available via Westlaw, but accessible at <http://books.google.com/ebooks/reader?id=W9UaAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.PA76>.

admit Pierce's children was illegal.⁶² However, Dixon observed, by way of dicta, that if all of the schools in Pierce's district were full, the court might reach a contrary result and Pierce, the plain text of the statute notwithstanding, would have no legal or equitable remedy (at which point he would need to move to another district, one assumes).⁶³

In 1886, an inter-district remedy was denied the plaintiff in *State ex rel. Comstock v. Joint School District No. 1 of Arcadia*.⁶⁴ Comstock, a citizen of Wisconsin living in a school district where no school was in session sued to have his sons admitted without charge to a school outside the district in which he resided, basing his suit on the provision in that state's constitution that schools should be "as uniform as possible" and "free and without charge for tuition, to all children between the ages of four and twenty years."⁶⁵ Focusing on the district-based nature of the state's system of public education, the Wisconsin Supreme Court held against the plaintiff, explaining that because there was no right to attend schools outside the district, it was not inappropriate for the other school to charge tuition to the plaintiff's children. Using language that would continue to appear in decisions pertaining to this issue well into the 20th century, the court stated that "wherever [the district] system has prevailed, the absolute right to the privileges of the school in any given district is confined to children residing such district, and having the prescribed qualifications."⁶⁶ The plaintiff—like so many after him—was limited in his relief by the arbitrary boundaries established via this method of school organization: absent the expenditure of \$10 in tuition payments (not an insubstantial sum in the deflationary economy of

⁶² *id.* at 78.

⁶³ *id.* "No doubt such a refusal would be legal, but no such grounds can be discovered in the evidence."

⁶⁴ *State ex rel. Comstock v. Joint School District No. 1 of Arcadia*, 65 Wisconsin 631 (1886). Again, the relation of this case to *Milliken v. Bradley* is noteworthy.

⁶⁵ Wisconsin Constitution of 1848, art. X, § 3.

⁶⁶ *Comstock* at 636.

1886), he could not fashion his own inter-district solution that ensured his sons received a “general and uniform” education.

In *People ex rel. Workman v. Detroit Board of Education* (1869), the venerable Justice Thomas Cooley of Michigan was faced with a case relating to access to schools within a single district. As in *Pierce* and *Van Camp*, the plaintiff Workman sought to have his children admitted to a Detroit school that had excluded them on the grounds that they were “mulattoes.”⁶⁷ Here too Cooley and his colleagues had a recent statute to interpret; in this instance, an 1867 amendment to the state’s primary school law that read “all residents of any district shall have an equal right to attend any school therein...providing that this shall not prevent the grading of schools according to the intellectual progress of the pupils.”⁶⁸ Cooley, who wrote in his treatise on the legislative powers of the American states that it fell to judges to declare laws unconstitutional only where “the legislature has failed to keep within its constitutional limits” and “deliberately disregarded the limitations imposed [upon it],” viewed judicial review of legislative enactments as a “solemn” duty and “only to be entered upon with reluctance and hesitation.”⁶⁹ In *Workman*, his majority opinion focused exclusively on the statute at issue, leaving aside any discussion of the education provisions in the state’s constitution. His initial reading of the statute, and the Detroit district’s resistance to it, was dismissive: “It cannot be seriously urged that with this provision in force, the school board of any district which is subject

⁶⁷ *People ex rel. Workman v. Detroit Board of Education*, 18 Michigan 400, 401 (1869).

⁶⁸ *id.* at 409.

⁶⁹ Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the America* (Boston, 1878), p. 195. Accessed at http://books.google.com/ebooks/reader?id=_zo1Gg3fStYC&printsec=frontcover&output=reader&pg=GBS.PA195. However, with regard to the constitutionality of legislation *segregating* the schools, Cooley writes the following: “Confining colored children to schools specially organized for them, does not impair or abridge any right, conceding that the right exists; it is a simple regulation of rights, with a view to the most convenient and beneficial enjoyment of them by all, and deprives no one of what is justly his own” (pp. 596-7).

to it may make regulations which would exclude any resident of the district from any of its schools because of race or color...[and] it is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant to be established.”⁷⁰

The “equal right” adverted to here is, of course, an “equal right *of access* to all the schools,” not some larger “fundamental right to education.” Considered even in this manner and predicated on a statute that could be revoked at any time, this is still a fascinating declaration—the limitations of which were discussed by Justice Campbell in his dissent. As noted earlier in this section, Campbell was quick to point out that there were no *constitutional* limitations on the right of the legislature to organize “different scholars” as they saw fit. In other words, if a different body of lawmakers were elected to serve in Lansing, Cooley’s decision could quickly be reversed by legislative fiat.

The framing and re-framing of subnational constitutions during the middle of the 19th century to include passages relating to the establishment of “free,” “thorough,” “open,” “efficient,” and “uniform” schools in one sense reflects the democratizing tendencies of that age. Moreover, it offers evidence of the impact of educational reformers who were exchanging ideas in a transnational context. That developments in public schooling in distant Prussia could prompt critical reevaluations in Ohio and Michigan indicates that knowledge in the Atlantic region was now traveling far beyond 18th century nodes of access such as Boston, Philadelphia, and Charleston. However, one must not overstate the significance of all this: state supreme courts found little guidance in this new constitutional language—perhaps no more than they had with earlier language, as in the Massachusetts Supreme Court’s *Dedham* and *Roberts* decision. Where constitutional text did compel a particular result, such as was the case in *Comstock*, that

⁷⁰ *Workman* at 410.

text was severely limited in its application. What progress was made in terms of access to public education in the states of the North and the Middle West came via statutes passed by legislatures. New Jersey and Michigan had yet to add any specific language to their constitutions integrating the public schools, but legislation passed to advance these objectives served the same purpose (although it was, of course, always subject to repeal). Finally, Michigan’s long struggle to create “free” public schools—a struggle that, owing to financial anxieties and a fear of oppressive taxation, culminated in a compromise to create “free” schools within five years—would have its analogs in the school funding crises of the 20th century.⁷¹

2.3 REBELLION, RECONSTRUCTION, AND “REDEMPTION”: MISSED OPPORTUNITIES TO CHART A NEW COURSE FOR PUBLIC EDUCATION, 1860-1900

The period from the Civil War to the beginning of the 20th century was a watershed moment in the framing of language related to education in subnational constitutions. It was not, like the era that had immediately preceded it, one concerned primarily with issues of “free” and “compulsory” schools; rather, many of the states that grappled with the re-framing of their education provisions during this time did so in large part to determine issues of access. As had been the case with the statute at issue in *Van Camp*, they were concerned with questions of classification: *Who* would attend the public schools? Were they to be “free and open” for all?

⁷¹ A point that will be made again both with reference to the push for Proposition 13 (the “People’s Initiative to Limit Property Taxation”) in California that followed the *Serrano v. Priest* decisions in the 1970s that is discussed in the succeeding chapter, as well as to the decision, addressed in chapter five, of Alabama voters in 2004 to reject a referendum that would have excised outdated, segregation-era language from that state’s constitution.

“Free and open” but separated along racial lines? This was, of course, a corollary of the long national debate over the legality of slavery in the states and territories—with education but one of the many aspects of American society that would be shaped and re-shaped by developments occurring within those states.

Quite understandably, the outbreak of war forced parties to the hostilities to engage in the hasty drafting of new constitutions. The “free-soiler” Kansas Constitution of 1855 borrowed the language of Article VI, Section 2 of the Ohio Constitution of 1851, stating that “the general assembly shall make such provision as will secure a thorough and efficient system of common schools throughout the state.”⁷² Pro-slavery delegates at Lecompton—established as a territorial capital-to-be by President James Buchanan—responded in 1857 with a constitution that also contained a mandate to the legislature to establish public schools throughout the state, albeit with a proviso: “The legislature shall, as soon as practicable, establish one common school (or more) in each township in the State, where the children of the township shall be taught gratis.”⁷³

Of course, the matter was, here as in other Western states, academic: Kansas did not have a consolidated system of public schools that serviced all students in the state until late in the 19th century.⁷⁴ The true distinction between the two constitutions was on the legality of slavery in the territory. The “free-soiler” constitution prohibited it; the “Lecompton” constitution did not. This was, along with the need to formalize various secession amendments or ordinances passed at the beginning of hostilities, the critical reason for the re-drafting of constitutions in all eleven of the States of the Confederacy.⁷⁵ At the close of the war—when those states either

⁷² Kansas Constitution of 1855, art. I, § 2.

⁷³ Kansas (Lecompton) Constitution of 1857, art. XIV, § 3.

⁷⁴ “Education in Kansas” in *Kansapedia: A Publication of the Kansas Historical Society*. Accessed at <http://www.kshs.org/kansapedia/education-in-kansas/14231>.

⁷⁵ i.e., now that they had severed ties from the United States, they needed new governing documents.

revoked their prior constitutions or established new ones—education was not addressed at great length.⁷⁶ The most notable provision related to education finance could be found in the Texas Constitution of 1866:

The Legislature shall, as early as practicable, establish a system of free schools throughout the State; and as a basis for the endowment and support of said system, all the funds, lands and other property heretofore set apart and appropriated, or that may hereafter be set apart and appropriated for the support and maintenance of public schools, shall constitute the public school fund; *and said fund, and the income derived therefrom, shall be a perpetual fund exclusively for the education of all the white scholastic inhabitants of this State, and no law shall ever be made appropriating said fund to any other use or purpose whatever.*⁷⁷

Here, then, was a prototype—and an explicit statement, at that—of how disenfranchisement in the South was going to proceed. It would, of course, be based on a the codification of an unequal racial classification—“whites” who could reap the benefits of the fund, as against “blacks” who could not—and it was to be effectuated here through the “power of the purse.” The Texas Constitution of 1866 did, however, contain a sop for African-American students:

The Legislature may provide for the levying of a tax for educational purposes; provided, the taxes levied shall be distributed from year to year, as the same may be collected; and provided, that all the sums arising from said tax which may be collected from Africans, or persons of African descent, shall be exclusively appropriated for the maintenance of a

⁷⁶ In order, the states adopting new constitutions at the close of hostilities were: Arkansas (1864), Louisiana (1864), Virginia (1864), Alabama (1865), Florida (1865), Georgia (1865), South Carolina (1865), Mississippi (1865), North Carolina (1865), Tennessee (1866), and Texas (1866). These constitutions were themselves upended after the formal imposition of federal Reconstruction, with all states save Tennessee enacting different constitutions in 1868, largely to deny political office to Confederate leaders. Information related to this welter of constitutional formation—which is difficult to keep track of even with the clearest of heads—can be found in *Franklin B. Hough* (ed.), *Constitutional Provisions in Regard to Education in the Several States of the American Union*, US Bureau of Education, Circular of Information no. 7 (Washington, D.C., 1875). It is also summarized in Eric Foner, “Reconstruction Revisited,” 10 *Reviews in American History* 90-94 (1982) and discussed in greater depth in David Tyack and Robert Lowe, “The Constitutional Moment: Reconstruction and Black Education in the South,” 94 *American Journal of Education* 236-256 (February 1986). A typical (and very simple) education provision of this time could be found in the Georgia Constitution of 1865, §5-3: “The General Assembly shall have power to appropriate money for the promotion of learning and science, and to provide for the education of the people, and shall provide for the early resumption of the regular exercises of the University of Georgia, by the adequate endowment of the same.”

⁷⁷ Texas Constitution of 1866, art. X, § 2 (emphasis added).

system of public schools for Africans and their children; and it shall be the duty of the Legislature to encourage schools among these people.⁷⁸

The door was left open for a legislative “solution” of some sort—taxes *may* be levied—but the text of the constitution appears to militate against the imposition of a statute such as the one Justice Cooley was left to interpret in *Workman*. As federal intervention in the South increased after 1867, Texas was forced to adopt a new constitution. In the West Texas Constitution of 1868—a document ratified prior to the conclusion of the 1869 Texas constitutional convention, when a split of the state into two parts seemed a possibility—this classificatory language had been excised, as had the precatory remarks about the legislature, should it deem such activity to be prudent, providing for African-American education. The following was substituted in its place:

And the Legislature shall appropriate all the proceeds resulting from sales of public lands of this State, to such Public School Fund. *And said Fund, and the income derived therefrom, shall be a perpetual fund, to be applied as needed, exclusively for the education of all scholastic inhabitants of this State*, and no law shall ever be made appropriating such fund, for any other use or purpose whatever.⁷⁹

At least for the moment, and at least in West Texas, the nexus between race and financial disenfranchisement had been severed. The results of the state’s 1869 constitution convention, however, were more muted—although the convention, which featured a great deal of rough-and-tumble action, certainly was not: during the eight months it took place “one delegate committed suicide, at least eight others were involved in fisticuffs on or off the convention floor, the Klan murdered another delegate, and another was expelled for the alleged rape of an eleven-year-old

⁷⁸ Texas Constitution of 1866, art. X, § 7. The original document may be accessed at <http://tarlton.law.utexas.edu/constitutions/text/image/F30.html>.

⁷⁹ West Texas Constitution of 1868, art. XII, § 6. Accessed at <http://tarlton.law.utexas.edu/constitutions/text/image/h32.html>.

girl.”⁸⁰ Despite radical demands on both sides—a proviso from one delegate requesting language related to integration in single-school districts, another from a delegate attempting to mandate segregated schools, and a third from a white representative to make a “guarantee” of education to children of all races⁸¹—the resulting language was similar to what appeared in the West Texas Constitution of 1868: “The Legislature shall establish a uniform system of Public Free Schools throughout the State...[which shall be supported by the public] fund...with the income derived therefrom, and the taxes herein provided for school purposes...to be applied exclusively for the education of *all* the scholastic inhabitants of this State.”⁸²

In Washington, the intellectual vanguard of the “Radical Republicans” then in control of Congress had commenced a serious discussion about ordering the defeated Confederate states to create free, integrated public schools as a condition of returning to the Union. Education was, of course, not the most important item on the agenda—securing universal male citizenship and suffrage was—but it was viewed by some legislators as absolutely essential to the proper exercise of both of those rights. Charles Sumner, whose abolitionist views had led him to represent Sarah Roberts in her attempt to gain access to a neighborhood school in Boston and eight years later landed him on the wrong side of a ferocious beating from the metal-tipped cane of South Carolina Congressman Preston Brooks, rose to offer a plea to his fellow senators to amend the Reconstruction Act to create a right of free access to the public schools for all

⁸⁰ Richard L. Hume and Jerry B. Gough, *Blacks, Carpetbaggers, and Scalawags: The Constitutional Conventions of Radical Reconstruction* (Louisiana State University Press: Baton Rouge, 2008), p. 211. Considering that there were only 92 delegates at this convention, and eleven of them were implicated in the passage quoted here, it must have been quite the event.

⁸¹ *id.* at 214 (emphasis added).

⁸² Texas Constitution of 1869, art. IX, §§ IV, VI. Accessed at <http://tarlton.law.utexas.edu/constitutions/text/image/G31.html>. One of the major issues discussed at this convention was whether to divide the state. This was why the West Texas Constitution of 1868, mentioned *supra*, had been drafted in the first place.

citizens, as he believed the Guarantee Clause of the United States Constitution empowered them to do⁸³:

You have prescribed universal suffrage. Prescribe now universal education. *The power of Congress is the same in one case as in the other.* And you are now under an equal necessity to exercise it. Voters by the hundred thousand will exercise the elective franchise for the first time, without delay or preparation. They should be educated promptly.⁸⁴

This is, in and of itself, a significant statement. Prior to the Civil War, sectional conflict had precluded the implementation of any systematic federal mandate regarding education. But here Sumner, who had waited out the long struggle for abolition, articulated a clear rationale for creating what might have, with the passage of time and various favorable judicial decisions, crystallized into a “fundamental right” alongside such rights as the right to vote, the right to procreate, and so forth.⁸⁵ What also warrants notice is how Sumner, after a lengthy but vague description of the “value” of education, then characterized the sectional conflict of the pre-war years in terms of differing approaches to education taken in the North and South:

The contrast between the rebel States and the loyal States appeared early. It was conspicuous in two Colonies, each of which exercised a peculiar influence. Massachusetts began her existence with a system of free schools...[and] at the same time Virginia set herself openly against free schools. The papers of the day...show how the original spirit of Virginia...still animates these states. A motion to print two hundred copies of the report of the State Superintendent of Public Education was promptly voted down in the Senate of Louisiana, while a Senator...‘denounced the public education scheme as an unmitigated oppression, an electioneering device, an imposition...’⁸⁶

⁸³ “The United States shall guarantee to every State in this Union a Republican Form of Government.” Sumner read this provision as granting Congress to order the readmitted states of the Confederacy to include provisions for “free education for all citizens” in their state constitutions.

⁸⁴ Congressional Globe, 40th Congress, 1st Session, March 16, 1867 (emphasis added). Accessed at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=078/llcg078.db&recNum=302>.

⁸⁵ As in, for example, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973), which is discussed in greater detail in the next chapter. Had that Court—or even the *Brown* Court—been presented with longstanding federal legislation or perhaps even a special “sixteenth amendment” (which Sumner is not advocating, as discussed in f.n. 81, *supra*, but which could very well have been passed during this period) ordering universal access to education, it is likely that the holdings in those cases would have been quite different (more radical in the case of *Brown*; a decision in the opposite direction in the case of *Rodriguez*).

⁸⁶ Congressional Globe, 40th Congress, 1st Session, March 16, 1867. Accessed at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=078/llcg078.db&recNum=302>.

Sumner's proposed amendment was opposed by New Jersey senator Frederick Theodore Frelinghuysen, who viewed the measure as a bridge too far:

The proposition is that we shall provide free schools without distinction of race. The reconstruction law already provides that there shall be no discrimination in legislation on account of race or color. The fourteenth amendment has that provision, and that amendment must be part of the constitution before any one of these states can be introduced. There is, therefore, no necessity for that part of the senator's amendment.⁸⁷

Frelinghuysen's sentiments were echoed by others, who either saw it as a pointless imposition or something that was covered, at least implicitly, by legislation that had already been approved. The vote on the amendment ended in a tie, with 20 voting for it and 20 against, and so a very brief "federal moment"—or at least a moment when the federal government might have engaged in dictating the terms of the subnational constitutions of the states that comprised it—came to an end. Frelinghuysen and his supporters would be proved incorrect—the limitations of the Reconstruction Act and the Thirteenth and Fourteenth Amendments soon became all too manifest—but that outcome was likely not something in contemplation of many members of a Republican Party then in its ascendancy.⁸⁸

With two significant exceptions, the remaining Reconstruction-era constitutional conventions were much like the Texas convention discussed earlier: comprised largely of white southerners, chaired by southern whites, and with a majority of white moderate Republicans at least partially counterbalanced in most instances by whites who voted somewhat more

⁸⁷ *id.*

⁸⁸ As in, for example, the *Slaughter-house Cases*, 83 U.S. 36 (1873) (holding that the privileges and immunities of citizenship of the United States were to be protected by the Fourteenth Amendment, not the privileges and immunities of citizenship of a state) and most notably in *Plessy v. Ferguson* 163 U.S. 537 (1896) (holding that the "separate but equal" provision of private services mandated by state government is constitutional under the Equal Protection Clause of the Fourteenth Amendment).

conservatively.⁸⁹ The role of African-Americans and “carpetbaggers,” then, was largely overstated—blown up and distorted by authors and artists interested in perpetuating a “Lost Cause” mythology—and the reforms that emerged from these conventions were much more measured, having been in most cases the product of serious deliberation and the result of close committee votes. The provisions related to education that these delegates drafted were, in the aggregate, designed to bring state oversight of education in line with developments in the North and Midwest mentioned earlier. All ten of the Reconstruction constitutions created the position of a state superintendent or commissioner of public education, and all but three established a board of education to manage the system.⁹⁰ The constitutions of Arkansas and Mississippi contained language, similar to that found in the Wisconsin and Michigan constitutions, mandating the forfeiture of a school district’s claim to monies from the state fund if those districts did not maintain public schools for a set number of months each year.⁹¹ However, not all developments were so positive: Alabama’s Constitution of 1867, the product of a somewhat more conservative convention, allowed for the establishment of ‘one or more schools’ in each

⁸⁹ Richard L. Hume and Jerry B. Gough compiled precise tallies for *Blacks, Carpetbaggers, and Scalawags: The Constitutional Conventions of Radical Reconstruction*, p. 257: “In seven of the eleven conventions, native white southerners actually comprised delegate majorities. Over half of all the standing committees (108 of them, or 53.7%) were chaired by southern whites. Outside whites presided over the bulk of the remainder (79, or 39.3%), while blacks secured a scant 13 chairmanships.”

⁹⁰ The Reconstruction constitutions of Georgia (1868), Louisiana (1868), and Texas (1869) did not establish boards of education. In his *Sources and Documents of United States Constitutions* (Oceana Publications, New York: 1979), William Swindler observes that such measures were “in part a reflection of the awakening national interest in universal public schooling and in part a Radical [Republican] device to create a major division of the government,” at p. 100, n. 6. Such a federal Department of Education was indeed created in 1867 by the Department of Education Act, but it was reduced to an office in 1868 and later became a small bureau within the Department of Interior, where it would remain until it was transferred to the Federal Security Agency during Franklin Roosevelt’s second term in office.

⁹¹ Arkansas Constitution of 1868, art. IX, § 6; Mississippi Constitution of 1868, art. VIII, §5. The North Carolina Constitution of 1868, art. IX, § 3 allowed for arrest of local school officials who were not maintaining public schools in their districts for four months out of the year.

district, language that appears to leave the door open to the creation of a segregated school system.⁹²

Of course, that same “one or more schools” language appeared in the two most “radical” of the Reconstruction constitutions, those of South Carolina and Louisiana. Both states saw substantial participation from black delegates in their conventions—50 in Louisiana, 72 in South Carolina—as well as a fair number of outside or “carpetbagger” whites.⁹³ In the latter state, where Radical Republicans held a considerable majority of the delegate positions, Afro-Jewish educator Francis Cardozo—who had been graduated from the University of Glasgow and was a distant cousin of future Supreme Court justice Benjamin Cardozo—led a push to create a system of public schools that would be open to all and supported by a statewide policy of compulsory attendance. “We may never have a more propitious time,” he observed during the convention, “for when the old aristocracy...get[s] into power...they will never pass a law such as this.”⁹⁴ One of the provisions emerging from this convention—that of public schools open to students “without regard to race, color, or previous condition”—horrified delegates such as Odell Duncan, who believed this clause to be “fraught with danger to the peace and harmony of the

⁹² Hume and Gough at 254.

⁹³ *id.* at 185-186. Also see Rebecca J. Scott, *Degrees of Freedom* (Cambridge, 2009), pp. 41-46 for a discussion of the 1868 Louisiana Convention: “Elections for the new Constitutional Convention took place across the state...[and] Republicans won in nearly every district, and roughly half of the ninety-eight seats went to candidates of some African ancestry.” Scott goes on to situate the convention in a transatlantic context, emphasizing the “Afro-Creole political tradition” of many of the delegates and its accompanying “commitment to rights [that] reflected an even deeper and more radical insistence on the morality of all human beings...[owing to its] roots...in a combination of Christianity with French and American revolutionary ideologies, sometimes accompanied by an acknowledgement of the Haitian struggle and the republican creed of the 1848 Revolution in France.”

⁹⁴ Proceedings of the Constitutional Convention of South Carolina of 1868 at 696, 707. However, Cardozo thought setting a date as early 1875 for the full implementation of this school system to be “extremely ridiculous,” believing that 1890 would be more appropriate. Cardozo, who later served as secretary of state and then secretary of the treasury for South Carolina, did not endure long past 1875 in that state himself: after being tried and convicted for conspiracy in 1877 and serving six months in jail, he moved to Washington, D.C., where he worked for the Treasury Department.

State, and to the friendly relations between the two races.”⁹⁵ Jonathan Wright, another white delegate, mollified the other members of the convention by noting that even though that passage provided for integrated schools, he did “not believe the colored children will want to go to the white schools, or vice versa...and I think there will be separate schools established, and there is no clause in our Constitution that prevents it.”⁹⁶ The article—which, rather than prohibiting segregated schools, simply did not mandate them—passed easily, by a vote of 96 to 4.⁹⁷ The constitution adopted by the Louisiana delegates—some of whom were influenced by what Rebecca Scott has characterized as “a combination of Christianity with French and American revolutionary ideologies, sometimes accompanied by an acknowledgement of the Haitian struggle and the republican creed of the 1848 Revolution in France”⁹⁸—took a different position: “There shall be no separate schools or institutions of learning established exclusively for any race by the state of Louisiana.”⁹⁹

This was a moment of triumph for reformers, but another trend in the framing of education provisions had already begun. The Missouri Constitution of 1865 contained the following language: “Separate schools may be established for children of African descent.”¹⁰⁰ That permissive language gave way during Missouri’s 1875 constitutional convention, where delegates voted to replace “may” with “shall.”¹⁰¹ West Virginia had already taken similar

⁹⁵ *id.* at 891-902.

⁹⁶ *id.*

⁹⁷ *id.* See Hume and Gough at p. 177 for a discussion of this vote. Although this provision was never at contest in any recorded appellate court decision that I could discover, this bit of legislative history—and the resulting affirmative vote for it—suggests that this is how it was meant to be interpreted. It also bears noting that African-American delegates were not always in favor of integrated schools. One delegate in North Carolina stated that he would “always do all what I can to have colored teachers for colored schools...[which] will necessitate separate schools as a matter of course.” Carolina Convention Journal of 1868, 342.

⁹⁸ Scott, *Degrees of Freedom* at p. 45. See also n. 91, *supra*.

⁹⁹ Louisiana Constitution of 1868, title VII, art. 135. Accessed at <http://www.archive.org/stream/constitutionadopl868loui#page/16/mode/2up>.

¹⁰⁰ Missouri Constitution of 1865, art. IX, § 2.

¹⁰¹ Missouri Constitution of 1875, art. XI, § 3.

measures in 1872, adding a provision that “white and colored persons shall not be taught in the same school.”¹⁰² The actions taken by delegates in such “nearly-Southern” states—which were not covered by the terms of the Reconstruction Act—offered a foretaste of what sort of constitutional re-framing would take place once federal supervision in the South had ceased.¹⁰³

The period from the end of Reconstruction to the beginning of the 20th century was characterized by the drawing of these sharp sectional distinctions regarding education. New York, as well as the new states of the West—Idaho, Montana, North Dakota, Washington, Wyoming, and Utah—added passages ordering the legislature to create public school systems that were open to *all* children.¹⁰⁴ Florida, on the other hand, *deleted* its reference to a school system open to all children, replacing the lofty exhortation that “it is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference” with a much more subdued statement: “the Legislature shall provide for a uniform system of public free schools, and shall provide for the liberal maintenance of the same.”¹⁰⁵

Although *de facto* segregated schools had already appeared in both states long before the fact, Louisiana and South Carolina held constitutional conventions where the earlier education clauses, and the constitutions that contained them, were formally revoked. Chairman Robert Aldrich, in his address to the South Carolina’s 1895 constitutional convention, spoke of the sacred mission facing the delegates: to frame a constitution that would undo the 1868

¹⁰² West Virginia Constitution of 1872, art. XII, § 8. Accessed at <http://www.wvculture.org/history/government/1872constitution.html>.

¹⁰³ The fate of Francis Cardozo, discussed in n. 92, *supra*, was also intimately linked to these events.

¹⁰⁴ New York Constitution of 1894, art. XI, § 1; Montana Constitution of 1889, art. XI, § 7; North Dakota Constitution of 1889, art. 8, § 147; South Dakota Constitution of 1889, art. VIII, § 1; Washington Constitution of 1889, art. IX, § 1; Wyoming Constitution of 1889, art. VII, § 9; Utah Constitution of 1895, art. X, § 1.

¹⁰⁵ Florida Constitution of 1868, art. IX, § 1; Florida Constitution of 1885, art. XII, § 1 (accessed at <http://www.law.fsu.edu/crc/conhist/1885con.html>).

constitution, which had been forced upon South Carolina by “the Reconstruction Acts, which were notoriously unconstitutional” and written by “aliens, negroes, and natives without character, all enemies of South Carolina...[who desired to] insult our people and overturn our civilization.”¹⁰⁶ The delegates complied, and, among other changes, the old education article—which Francis Cardozo had urged delegates at the 1868 convention to adopt, because such an opportunity might never again arise—was replaced with language ordering that “separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race.”¹⁰⁷

Louisiana Democrats, once again in firm control of the state after a tense period in the late 1880s and early 1890s when a “fusion” ticket of white Farmers’ Alliance supporters and African-Americans had challenged their legislative supremacy, held a constitutional convention in 1898 to consolidate their gains. The central provisions of this new constitution—Article 197, Sections 3 and 4—concerned the implementation of a combined literacy test and property tax qualification for voting, the effect of which was to disenfranchise nearly every African-American voter in the state.¹⁰⁸ Section 5 of that article contained a “grandfather clause” allowing males who were able to vote before January 1867 to continue to do so, but only if they registered to vote by September 1st of 1898.¹⁰⁹ The old education clause, which had prohibited segregated

¹⁰⁶ Journal of the Constitutional Convention of the State of South Carolina, p. 2. Accessed at <http://books.google.com/ebooks/reader?id=mQhAAAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.PA2>.

¹⁰⁷ South Carolina Constitution of 1895, art. XI, § 7. Accessed at <http://www.archive.org/stream/cu31924030491900#page/n47/mode/2up>.

¹⁰⁸ Louisiana Constitution of 1898, art. 197 §§ 3, 4. Accessed at <http://books.google.com/ebooks/reader?id=97ESAAAAAYAAJ&printsec=frontcover&output=reader&pg=GBS.PA7>.

¹⁰⁹ *id.* at § 5. Rebecca Scott notes that equal-rights activists in the North intended to challenge this constitution as contrary to the Fourteenth and Fifteenth Amendments, but “time was against them...and [soon] not only would the Republican Party in Louisiana collapse completely, but the faint final hope of using the ballot to extract concessions from Democrats would fast disappear as well” (p. 166).

schools, was replaced with a new one that now mandated them: “There shall be free public schools for the white and colored races, separately established by the General Assembly, throughout the State, for the education of all the children of the State between the ages of six and eighteen years.”¹¹⁰ Murphy Foster—the last governor of Louisiana to face a serious challenge from a Republican candidate for nearly eight decades—remarked with satisfaction on what the delegates had wrought: “The white supremacy for which we have so long struggled at the cost of so much precious blood and treasure, is now crystallized into the Constitution as a fundamental part and parcel of that organic instrument.”¹¹¹

These late 19th-century Southern constitutional conventions and the “Redeemers” who served in them had, then, succeeded in redrawing formal distinctions among the races. Many states in the North went in the opposite direction, using constitutional language to formally integrate their schools. In both cases, constitutional framing was the instrument by which sectional differences were redrawn—and the operation of these new “apartheid” education provisions, as will be discussed in greater detail in chapter two, would precipitate the greatest school funding crisis in the nation’s history.

Three notable state supreme court cases from this period serve to inform our understanding of the “weight,” or lack thereof, that these provisions carried in the minds of those tasked with interpreting them. In *Grove v. School Inspectors of Peoria*, a challenge to the school inspectors’ ability to apportion and establish the school district of Peoria, Illinois, as they saw fit—which was then only capable of serving a quarter of the district’s students—was met with a curt rejoinder from Justice Sidney Breese.¹¹² Writing for the majority, Breese held that it was

¹¹⁰ Louisiana Constitution of 1898, art. 248.

¹¹¹ Quoted in Scott, p. 164.

¹¹² *Grove v. School Inspectors of Peoria*, 20 Illinois 532 (1858).

left to the inspectors to operate as they deemed fit, with the court able to intervene only in situations where “oppression, corruption, or act of gross injustice” had occurred—and no such condition was met, even where the school system could not accommodate 3,000 of its 4,000 possible pupils.¹¹³ Of course, working as they were from the Illinois Constitution of 1848, the justices had little to interpret—the only mention of education in that constitution, besides an earlier passage exempting school property from taxation, was found in Article IX, Section 5 in a sentence vesting school districts with “the power to assess and collect taxes for corporate purposes.”¹¹⁴

A pair of cases considered the implications of the Fourteenth Amendment, ratified in 1868, as it related to the provision of education in the states. In *Ward v. Flood*, the Supreme Court of California was asked to make a final determination on African-American Harriet Ward’s petition to have her daughter admitted to the public school nearest her home.¹¹⁵ California had enacted a statute in 1869 ordering that “the education of children of African descent, and Indian children, shall be provided for in separate schools,” and the case turned on how that law was impacted, if at all, by the Equal Protection Clause of the Fourteenth Amendment.¹¹⁶ Writing for the majority, Chief Justice William T. Wallace stated that “[this] clause of the Fourteenth Amendment referred to did not create any new or substantive legal right, or add to or enlarge the general classification of rights of persons or things existing in any State under the laws thereof...[but rather] operated upon them as it found them already established, and it declared in substance that, such as they were in each State, they should be held and

¹¹³ id. at 543.

¹¹⁴ Illinois Constitution of 1848, art. IX, § 5. Accessed at http://en.wikisource.org/wiki/Illinois_Constitution_of_1848#Article_IX._Revenue.

¹¹⁵ *Ward v. Flood*, 48 California 36 (1874).

¹¹⁶ id. at 48.

enjoyed alike by all persons within its jurisdiction.”¹¹⁷ As for whether that amendment affected in any way “the policy of separation of the races for educational purposes,” Wallace looked to Justice Shaw’s *Roberts* decision as persuasive authority: “But when this great principle [of equality, as embodied both in the Massachusetts Constitution and in the Equal Protection clause of the Fourteenth Amendment] comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law.”¹¹⁸ Ward, then, would find no relief in the Fourteenth Amendment—although Wallace added, by way of conclusion, that this only obtained insofar as California school districts, such as Ward’s district in San Francisco, formally maintained separate schools.¹¹⁹

The Ohio Supreme Court reached a similar result in *State ex rel. Garnes v. McCann* (1871), which concerned the African-American plaintiff’s petition to have his children admitted to a public school in a district that maintained no separate school for African-Americans.¹²⁰ Ohio’s “classificatory” education law—which had also been at issue in *Van Camp*—was again implicated here, in that it permitted school districts with fewer than 20 African-American residents of “school age” to operate only a school for whites, while “setting aside” any monies (i.e., not including them in the school fund) raised from those African-American families.¹²¹ Restating the court’s holding in *Van Camp*, Justice Luther Day—whose son William Day would

¹¹⁷ *id.* at 50.

¹¹⁸ *id.* at 54.

¹¹⁹ *id.* at 57.

¹²⁰ *State ex rel. Garnes v. McCann*, 21 Ohio 198 (1871).

¹²¹ *id.* at 206.

serve on the United State Supreme Court—wrote that “the [Ohio] constitution contains no restrictions upon the ‘legislative discretion,’ in regard to the classification of the youth of the State for school purposes.”¹²² As for the discretion afforded by Article 6, Section 2 of that constitution, it extended to any and all laws that “are ‘suitable’ to secure the organization and management of the contemplated system of common schools, without express restriction, except that ‘no religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of the State.’”¹²³ In other words, the discretion of the legislature in matters relating to public education was constrained *only* by an explicit provision in the constitution so limiting it.

Day, however, recognized that this case had not been brought to upset the holding in *Van Camp*, but rather to test the limits of the Equal Protection Clause of the Fourteenth Amendment: “It is quite apparent from this state of the case, that the proceeding is brought, not because the children of the plaintiff are excluded from the public schools, but to test the right of those having charge of them to make a classification of scholars on the basis of color.”¹²⁴ Although he knew that a proper interpretation of this amendment had not yet been “judicially settled,” he had “strong reason to believe” that “it includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States.”¹²⁵ Moreover, the Equal Protection Clause “only affords to colored citizens an additional guaranty of equality of rights to that already secured by the constitution of the State.” In Day’s view, the law at issue here—Ohio’s “classificatory” education law requiring separate schools for African-American and white

¹²² *id.* at 204.

¹²³ *id.*

¹²⁴ *id.*

¹²⁵ *id.* at 211. And this is indeed how the Supreme Court would resolve the matter two years in the *Slaughter-house Cases*, 83 U.S. 36 (1873). See n. 86, *supra*.

students—fully “recognizes their right, under the constitution of the State, to equal common school advantages, and secures to them their equal proportion of the school fund...[while regulating] the mode and manner in which this right shall be enjoyed by all classes of persons.”¹²⁶ The law, in Day’s view, was “equal” in that it applied equally to both African-Americans and whites.

Absent statutory measures to the contrary, then, federal or state judicial relief would not be forthcoming for those who lacked full access to public education at the end of the 19th century. But, given the appalling disparity in resources directed to African-American students in segregated schools, this denial of access became untenable. Or, to put it a bit differently, the Supreme Court near the middle of the 20th century would begin to hold that this was so.

2.4 CONCLUSION: ACCESS, AND CRISIS

Three conclusions emerge from this survey of the development and interpretation of education provisions added to state constitutions over the course of the 19th century. The first is simple enough: with the possible exception of those Radical Republicans who discussed “nationalizing” the education system during the late 1860s, no person involved in the framing of these provisions intended to make education a “fundamental right” of the citizens of their states in the sense that the term is used today. Yet this all-too-facile first conclusion leads directly to the second: however much the arguments over education finance that will be discussed in chapter three invoke “history” and “the intent of the framers” as a means of dispute resolution, those subjects

¹²⁶ *id.* at 210.

have little to do with the legal significance of such provisions. Of course, one can, by examining the imbrication of these constitutional framings and re-framings and attending carefully to the discourse out of which they were written, determine what their framers intended; it is, in this case, especially easy to do, since their framers intended them to mean very little at all.¹²⁷

However, the thesis that these framers' intentions are in any way *controlling* today is as flimsy as the oft-amended and/or superseded state constitutions in which they appear. Put plainly, to argue in this way is to ask the following question: Did the framers intend their intentions to matter? And, short of the appearance of such language in the text itself—say, a footnote in the constitution stating that “for all matters to be adjudicated in years to come regarding the Article VI, Section 2, please refer to pages 100 through 200 of the Journal of the Constitutional Convention of 1898 for specific guidance”—then the answer to this question would seem to be of no consequence whatsoever. An examination of the 20th century decisions regarding these education provisions confirms that: while those state supreme courts did not reach their holdings “as they pleased” or “under self-selected circumstances,” each of them wound up “making law,” including those that claimed to have “found” it in an age-old precedent or organic law.

This brings us, then, to the third conclusion: What exactly *was* created by these provisions, if not a “fundamental right” to education? I would argue that it was a *right of access to education*, at a minimum. Excepting the “Redeemer” constitutions of the post-Reconstruction South, there was a noticeable trend in the 19th century toward expanding opportunities for

¹²⁷ A fuller discussion of this—and one that ranges far beyond my competency to articulate it in sufficiently precise terms—may be found in Quentin Skinner, “Conventions and the Understanding of Speech Acts,” 20 *The Philosophical Quarterly* 79 (April 1970), pp. 118-138. Accessed at <http://www.scribd.com/doc/25403136/skinner-quentin-conventions-and-the-understanding-of-speech-acts>. H. Jefferson Powell, “The Original Understanding of Original Intent,” 98 *Harvard Law Review* 885 (1985); William W. Fisher, “Texts and Contexts: The Application to American Legal History,” 49 *Stanford Law Review* 1065 (1997); and Hans W. Baade, “‘Original Intent’ in Historical Perspective: Some Critical Glosses,” 69 *Texas Law Review* 1001 (1991) are also instructive here.

children to attend public schools. This is a trend reflected not only in the increasingly detailed education clauses found in many of these constitutions but also in those statutes passed to enable them, such as the statute mandating integration of the schools upon which Justice Cooley passed judgment in *Workman*. In other words, it was the effort of policymakers of this generation to make education such a critical function of their state and local governments that provided Chief Justice Warren the basis from which to remark, as quoted *supra*, that this was so.

As for those “Redeemer” constitutions: they too were concerned with access to education, in the sense that they sought to restrict it. And the statutory means of enabling these provisions, which precipitated the great school funding crisis discussed in the next chapter, were so egregious that they galvanized a well-coordinated response from civil rights activists that eventually led to the result in *Brown v. Board of Education*. It is to this response that our attention now turns.

3.0 THE STRUGGLE FOR SCHOOL FINANCE EQUITY IN THE COURTS, 1900-2000

In the previous chapter, I examined the origins and evolution of public education provisions codified in state constitutions and looked at how various state supreme courts had interpreted these provisions. After surveying developments during the post-Revolutionary and late antebellum periods that had led, in fits and starts, to the growth of public education in the United States, I concluded with a discussion of the constitutional reframing that had occurred during and after Reconstruction. There I noted how some states—primarily those in the North and West—chose to continue expanding access to their public school systems, while others—notably those states that had comprised the Confederacy, as well as “near-South” border states such as Missouri and West Virginia—added language to their constitutions that mandated legal segregation.

Here is how I will proceed in chapter three. In the first section, I intend to show how the restrictive methods of constitutional framing in those states precipitated a school funding crisis of considerable magnitude throughout the South—a crisis that, far from improving, actually worsened with the passage of time. After demonstrating how stark these funding disparities had become, I will analyze how the NAACP litigation team’s strategy of challenging the prevailing “separate but equal” doctrine succeeded in considerable part because these institutions were so poorly funded.

Of course, the notion that America's system of apartheid schooling collapsed because its foundational myth proved untrue is not in itself an especially novel claim. In the next section of this chapter, though, I continue to explicitly link notions of race and class—arguing for their fundamental conceptual inseparability—in the context of the US Supreme Court's 1973 milestone school funding decision in *San Antonio Independent School District v. Rodriguez* as well as the school funding litigation that commenced at the state level afterwards, thereby substantiating political scientist Douglas Reed's claim that "race and class disadvantages, combined, produce a common core of inequality that blurs legal and theoretical distinctions [between the two]."¹ Moreover, I place these cases within the movement toward a "New Judicial Federalism" that began in the late 1970s. My treatment of the notable state cases following *Rodriguez* consists of a careful interpretation of the legal theories advanced by the justices writing those opinions as well as the response from policymakers to them—both in their public statements and at the various state constitutional conventions held throughout this period.² In addition to emphasizing the nexus between race and class that appears in all of these examples, I situate incidences of negative public reaction to this litigation, where applicable, within the context of what sociologist Isaac Martin has termed "the permanent tax revolt."³ In other words, the backlash to school funding decisions in California and elsewhere would, much like the related anti-bussing and anti-property tax movements, emerge from a grassroots, multi-class network of activists to become one of the many "third rails" of what today constitutes "mainstream" conservative politics.

¹ Douglas Reed, *On Equal Terms* (Princeton, 2002), p. 163.

² I have chosen to confine my analysis to "representative" cases throughout the decades, as an exhaustive survey of this litigation would spill into the thousands of pages. In the subsequent chapter, I move from a treatment of *cases* to a detailed examination of a single *case*—an examination which is designed to illustrate, in microcosm, the policymaking give-and-take that has characterized so much of this litigation.

³ Isaac Martin, *The Permanent Tax Revolt* (Stanford University Press, 2008).

The third section of this chapter considers school finance litigation that has occurred after 1989, a year when many scholars believe that a decision by the Kentucky Supreme Court altered the nature of the judiciary's involvement in these matters. While conceding that plaintiffs have amended their litigation strategies and consequently achieved notable successes in terms of school finance reform in states such as Massachusetts and Vermont over this period, I also draw attention to plaintiffs' defeats in Illinois and Pennsylvania—where the nineteenth-century interpretation of these education clauses remains the preferred interpretation of those courts—as well as a convoluted, voter-led movement for constitutional reform in Florida that has so far yielded few practical results. Finally, I close the section by discussing a Connecticut case where, for the first time in the history of this process, a majority of justices on a state supreme court agreed that, with regard to school funding disparities in their state, race and class were inseparably linked.

In doing all of this, I hope to accomplish several objectives. First, I seek to challenge the notion, put forward by many scholars, that there is or at least should be a single preferred model for adjudicating these cases.⁴ My second and related objective is to argue that this litigation is best understood as “judicial policymaking” and should be treated as such. As the previous chapter established, understanding the original application of these clauses, however helpful from a historical standpoint, offers little guidance for how they should be interpreted and effectuated in the present. Accordingly, however useful periodizing this litigation into “waves” of cases—a “second wave” after one decision, a “third wave” commencing after another—might be, my final and chief object is to reclassify them as parts of a single “wave”: one that began as

⁴ See, for example, William Thro's four-category breakdown of education clauses—with each category yielding an “obvious” or “self-evident” litigation outcome—in “The Role of Language of the State Education Clauses in School Finance Litigation,” 79 *Education Law Reporter* 19 (1993).

a ripple with a handful of early victories by the NAACP's litigation team, crested with the decision in *Brown v. Board of Education*, declined until it had reached a trough with *San Antonio v. Rodriguez* in 1973, and proceeded with varying outcomes at the state level up until the present. In other words, these cases are all parts of the same process, regardless of whether they were treated with "strict scrutiny" because the challenged laws explicitly made a racial classification or given "rational basis" review because they merely concerned economic classifications. The decision by many jurists—even many of those who ultimately found against their state's method of funding the public schools—to maintain an analytical distinction between race and class has complicated and prolonged the resolution of an issue that is, in the minds of many who are internal to the system, spurious at best and harmful at worst:

‘Is it a matter of race?’ I ask [Samantha, an East St. Louis high school student]. ‘Or money?’ ‘Well,’ she says...‘the two things, race and money, go so close together—what’s the difference?’⁵

3.1 JIM CROW AND SCHOOL FINANCE INEQUALITY, 1900-1960

The political leaders of the post-Reconstruction South, far from disentangling “money” and “race,” had formally linked them. Such public schools as did exist for African-Americans were the remnants of the Reconstruction period, when delegates to constitutional conventions had attempted to standardize the systems of public education in this region along the same lines as those obtaining in the North and West. These “colored” school systems were situated in an especially precarious position. The property tax assessments as would be levied to support the public schools in areas where African-Americans constituted the majority of the population

⁵ Jonathan Kozol, *Savage Inequalities* (New York: Crown Publishers, 1991), p. 31.

would, one assumes, inure to the benefit of that majority in proportion to its share of the population.⁶ And yet in Mississippi in 1900—a state where 60 percent of the school-age population was African-American—4,419 white teachers taught 253,153 white students, with 3,033 African-American teachers left to supervise nearly 400,000 African-American students.⁷ The disparity in per capita expenditures in some Mississippi counties was nearly 20:1, with the overall wage gap between African-American and white teachers increasing by nearly twenty percent between 1884 and 1895.⁸ Within the United States generally in 1900, fewer than 33% of African-American school-age children were attending public schools.⁹

This state of affairs suited many enterprising Southern politicians. In a 1910 speech, Governor James Vardaman of Mississippi remarked on how education funding constituted an important front in the conflict between the races:

God Almighty created the negro for a menial—he is essentially a servant [and] when left to himself he has universally gone back to the barbarism of his native jungles. While a few mixed breeds and freaks of the race may possess qualities which justify them to aspire above that station, the fact still remains that the race is fit for that and nothing more...[And thus] it is inexplicable to me how an observant white man, informed of all the facts in the case, and who really understands the negro, can hold to any other view. The evidence is overwhelming and the conclusion inevitable. *Why the Legislature should hesitate to submit to the people an amendment to the Constitution, so as to change the absurd and expensive system now in vogue, is an inscrutable mystery to me. Until the*

⁶ W.E.B. DuBois (ed.), *The Negro Common School* (1901), p. 75. Accessed at <http://books.google.com/books/reader?id=iFoQAQAAIAAJ&printsec=frontcover&output=reader&pg=GBS.PA75>. The authors of this report calculated that, in many Southern states, African-Americans were “without doubt paying for all their schools by their direct taxes and their just share of other sources of income; and are also contributing a considerable sum to the training of white children.”

⁷ *id.*

⁸ *id.* at 80. However, in “Race Differences in Public School Expenditures,” Robert Margo—a student of Robert Fogel and Stanley Engerman—argues that this process of disfranchisement took far longer than either DuBois or Horace Mann Bond, who will be discussed *infra*, claimed. Analyzing Louisiana school funding between 1890 and 1910, Margo noted that expenditures at African-American schools remained “relatively equal” long after Reconstruction’s end, due to the “tenuous” nature of “Redeemer” administrations in these areas. As for why the “disfranchisement” that did occur, Margo is in agreement with DuBois and Bond: Southern white elites “bought” poor white votes by redistributing education revenue to white schools. Vardaman’s speech (n. 10, *infra*) offers one such example of this. Donald G. Nieman (ed.), *African Americans and Education in the South, 1865-1900* (New York: Garland, 1994).

⁹ DuBois at 85.

*Fourteenth and Fifteenth Amendments to the Federal Constitution shall be repealed, in dealing with race questions in educational, as in other matters, we must 'sweep the horizon of expedients' to find a way around them, and the way around them in this instance is to change the Constitution of Mississippi that the whole matter shall be left to the wise discretion of the Legislature...who will...enact laws...to disburse the public school fund as the interests of the public may dictate...Remove the Constitutional hindrance and the remedy will be discovered. Money spent today for the maintenance of the public schools for Negroes is robbery of the white man, and a waste upon the negro. You take it from the toiling white men and women, you rob the white child of the advantages it would afford him, and you spend it upon the Negro in an effort to make of the negro what God Almighty never intended should be made, and which men cannot accomplish.*¹⁰

Here, then, we have a politician arguing for a creative usage of “judicial federalism” that is not entirely dissimilar, at least formally speaking, to the “new judicial federalism” discussed later in this chapter. Vardaman viewed the process of amending Mississippi’s constitution—an easily altered document indeed, as is the case with all state constitutions—as an “end-around” play enabling the state to remove any remaining strictures from a system of education he perceived as a vestige of federal Reconstruction. In order to placate his poor white constituents, he offered a promise that the legislature, duly empowered by a revision of the state’s constitution, would then be able “to disburse the public school fund as the interests of the public may dictate”; i.e., it would be able to redirect monies earmarked for African-American schools to white ones. In educator Horace Mann Bond’s opinion, this state of affairs could be understood only if one also

¹⁰ “Message of James K. Vardaman, Governor of Mississippi, to the House and Senate of Mississippi, Thursday January 9, 1910” quoted in Horace Mann Bond, *The Education of the Negro in the American Social Order* (Octagon: New York, 2d ed. 1966), p. 103. In conjunction with the excerpt from Vardaman’s message, Gunnar Myrdal’s discussion of “white skin privilege” and cross-class racial alliances in *An American Dilemma* (New York, 1944) is instructive here: “Segregation and discrimination have had material and moral effects on whites, too. Booker T. Washington’s famous remark that the white man could not hold the Negro in the gutter without getting in there himself, has been corroborated by many white southern and northern observers. Throughout this book, we have been forced to notice the low economic, political, legal and moral standards of Southern whites-kept low because of discrimination against Negroes and because of obsession with the Negro problem. Even the ambition of Southern whites is stifled partly because, without rising far, it is so easy to remain ‘superior’ to the held-down Negroes” (p. 644). C. Vann Woodward explains that the extremely racist rhetoric employed by turn-of-the-century was due to the weakening of any credible opposition (e.g., northern Populist radicals, Northern liberals, “old” Southern conservatives who found “negrophobia” to be a distasteful lower-class phenomenon) to politicians like Vardaman. See Woodward, *The Strange Career of Jim Crow* (New York, 1955), pp. 50-52.

understood a particular aspect of Southern life: “the intense opposition to the education of Negro children...[was a result of the fact that] Negroes stood between two economic classes of white people and were innocent victims of the system by which school funds were expended.”¹¹ After “demagogues...went before their white constituents with the blame of a poor school system for whites laid at the doors of Negro children,” even those public funds intended to support schools in areas with a majority African-American population were instead “spent for the benefit of the few white children in those areas where Negroes were in a vast majority.”¹² By 1909, Bond reports that in some Mississippi counties, per capita expenditures for white and African-American students stood in an 80:1 ratio.

For similar reasons, and in similar respects, this re-appropriation of education resources by Democratic governments in the South continued throughout the teens and twenties. In 1915, South Carolina spent \$24 on each white student educated in its public schools; \$3 on each African-American student.¹³ Even in counties where its residents were mostly African-American, Virginia allocated four times as much money to white teachers for white students than it did for teachers in African American schools.¹⁴ In 1924-5, North Carolina’s legislature approved \$6,667,797 for use in the construction of white school facilities, as against \$444,285

¹¹ Bond at 100. This argument is also found in C. Vann Woodward, *The Strange Career of Jim Crow* (New York, 1955), p. 114 and John Hope Franklin, *From Slavery to Freedom* (3d ed., 1967), pp. 478-486.

¹² *id.* at 101

¹³ Louis Harlan offers the following data regarding African-American and white school expenditures in Georgia in 1915: Out of total expenditures of \$6,194,875.80, \$4,621,173.69 was directed to white schools and \$740,782.71 to African American schools. As for education above the elementary level, “ninety-two schools and sixty-seven teachers were reported to be training 1,411 Negro students...[although] the record does not explain how sixty-seven teachers could give courses in ninety-two schools.” As for South Carolina, he makes a comparison between 1900 (out of \$827,012.66 dollars, \$588,414.53 were allocated to white schools and \$177,954.69 to African-American schools) and 1915 (out of \$3,295,506.58, \$2,924,859.68 went to white schools and \$370,646.90 to African-American schools). See Harlan, *Separate and Unequal* (Chapel Hill, 1958), pp. 205, 247. See also A. Leon Higginbotham, *Shades of Freedom* (Oxford, 1996), p. 184.

¹⁴ In five “black counties” in Virginia, \$78,615.71 was directed to teachers in schools that educated 5,840 white students, with only \$20,852.16 going to teachers in schools that educated 13,462 African-American students.

for African-American schools.¹⁵ Most notable, perhaps, is the fact, until 1920, Georgia had no operative public high school for African-Americans—and had not had one since the 1899 Supreme Court decision *Cumming v. Richmond County Board of Education* (1899).¹⁶

The facts of *Cumming* warrant recapitulation, since in some ways the case is reminiscent of those Ohio state supreme court decisions—*Van Camp v. Board of Education of Logan* (1859) and *State ex rel. Garnes v. McCann* (1871)—concerning African-American access to the public schools that were discussed in the previous chapter.¹⁷ Moreover, it constitutes a fascinating companion case to *Plessy v. Ferguson*—an opportunity for the Court to make a statement, should it wish to do so, about the value of public education.¹⁸ And in *Cumming*, which concerned the decision by the Richmond County Board of Education to close a public high school for African-Americans because its members believed that the county lacked the resources to support both the high school and an African-American elementary school, the Court did indeed make such a statement, voting unanimously to uphold the decision of the Georgia Supreme Court. That court, per its Chief Justice Thomas Simmons, had dispatched the case using reasoning similar to what had been employed in *Van Camp* and *State ex rel. Garnes*: “If, in the judgment of its members, it was better for the interests of the people that 400 colored children should obtain the elements of a common-school education than for 50 or 60 colored children to receive the advantages of a high-school education...the board of education did not abuse its discretion in

¹⁵ Bond at 165. He notes that North Carolina, far from being an outlier in this respect, was among the “most progressive” Southern states with regard to funding its African-American schools. Louis Harlan notes that “even Negro schools in North Carolina were improved during this period [1900-1915], except in the all-important matter of relative status,” p. 134.

¹⁶ Higginbotham at 184; *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899).

¹⁷ *Van Camp v. Board of Education of Logan*, 9 Ohio 406, 410 (1859); *State ex rel. Garnes v. McCann*, 21 Ohio 198 (1871).

¹⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that the “separate but equal” provision of private services mandated by state government is constitutional under the Equal Protection Clause of the Fourteenth Amendment).

discontinuing the high school established for the colored race.”¹⁹ The Supreme Court, per justice John Marshall Harlan, conceded that no constitutional argument had been presented and that the case would therefore turn on whether the Richmond County Board of Education had acted in bad faith or abused its discretion. This being an extremely high bar to reach in any court case, he was left to conclude that the board had not. As for the seeming inequality of this state of affairs, Harlan remarked, “We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.”²⁰

3.1.1 Charles Hamilton Houston and the “Gradualist” Approach to Public School Integration

This state of affairs—both legally and practically—would not last forever. Even as revenue disparities widened between schools for African-American students and schools for whites, NAACP litigation director Charles Hamilton Houston was developing a plan for systematically testing segregation laws in various contexts.²¹ For his first challenge to the segregation in the

¹⁹ *Board of Education of Richmond County v. Cumming*, 103 Georgia 641, 643 (1898).

²⁰ *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 545 (1899).

²¹ Houston’s story has been told—well-told, in fact—in many works, most recently Rawn James, Jr., *Root and Branch: Charles Hamilton Houston, Thurgood Marshall, and the Struggle to End Segregation* (New York: Bloomsbury, 2010).

federal courts, Houston started at the post-secondary level: the University of Missouri Law School.²²

Missouri, as noted in the previous chapter, was among the “near-Southern” states that began imposing segregation laws even as federal Reconstruction continued in the South itself. Its policy had long been “to segregate the white and negro races for the purpose of education in the common and high schools of the State.”²³ To the extent that the state provided any form of higher education for African-Americans, it did so through Lincoln University, which it had opened as an agricultural and industrial school in 1891.²⁴ In 1935, Lloyd Gaines sought to enroll in law school, a program of study not offered by Lincoln. Rather than requesting that the administrators of Lincoln University offer such a program or asking them for funds to attend law school in another state, Gaines, acting at the behest of the NAACP litigation team, sued to enter the University of Missouri Law School, which was then the only such institution in the state.²⁵

The Missouri Supreme Court, per Judge William Francis Frank, held against Gaines. Repeating an argument seen frequently in these opinions, Frank wrote that “equality, and not identity of privileges and rights, is what is guarantied to the citizen” by the Missouri Constitution.²⁶ The fact that Missouri would “open” a law facility at Lincoln University²⁷ or

²² He and Thurgood Marshall had successfully litigated *Pearson et al. v. Murray*, 166 Maryland 478 (1936) two years earlier at the state supreme court level (holding that where African-Americans were denied admission to only law school maintained by state, provision by state for limited number of scholarships of \$200 each for African-American students to enable them to attend colleges outside of state to do work in any department held not to provide facilities for legal training substantially equal to those furnished for white students as required by equal protection clause of U.S. Constitution).

²³ *Lehew v. Brummell*, 103 Missouri 546 (1891).

²⁴ *State ex rel. Gaines v. Canada*, 342 Missouri 121, 130 (1937).

²⁵ Gaines’ tuition would not have been paid by the state; it would pay the difference between tuition charged at the University of Missouri and wherever Gaines had been admitted. After noting this, Judge Frank then offered a table showing that Gaines’ transportation costs to various law schools in nearby states would be lower than his transportation costs to Columbia, Missouri.

²⁶ *id.* at 133.

²⁷ Dean W. E. Masterson of the University of Missouri testified that such a “law faculty” could be created with considerable ease and at what he viewed as a reasonable cost: “Q. Now at what expense could a law school be

provide funding to Gaines to attend school in another state dispensed of the matter; although Gaines was concededly a “taxpayer of [the state of] Missouri” and so entitled to “equal advantage” arising from school funds, this did not also entitle him to the “privilege” of admission to the University of Missouri.²⁸

At the U.S. Supreme Court level, however, such arguments failed to secure a majority. Chief Justice Charles Evans Hughes, writing for the Court, observed that “the basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color.”²⁹ Considered in that light, then, “a privilege has been created for white law students which is denied to negroes by reason of their race.”³⁰ Contrary to the claims made by the state’s representatives, “the provision for the payment of tuition fees in another State does not remove the discrimination.”³¹

Missouri ex rel. Gaines (1938) constituted a modest first step at the federal level. Nothing in Hughes’ opinion spoke to the necessity of completely equalizing funding at separate law schools in a state. Instead, the opinion offered a remedy for African-Americans living in

established in Lincoln University for the instruction in law of one or two students, to give them such law school and standard of training equal to that in the Missouri University Law School?

A. Since you have the library there and the buildings-about the only item of expense would be the salaries of those two instructors.

Q. What would that be, to get men of equal grade with what you have in Missouri University?

A. I should say that you could get very excellent teachers of law varying from \$3,500.00 to \$5,000.00 a year.

Q. Assuming the top figure, could you establish a law school in Lincoln University for the instruction of one or two students and on a level of scholarship and training equal to that in Missouri University for a maximum of \$10,000.00 a year?

A. I think so.” Respondents’ Supplemental Brief to *Missouri ex rel. Gaines v. Canada* at 2.

²⁸ *id.* at 134. Frank distinguished this case from *Pearson v. Murray* (n. 21) by explaining that Missouri had long had a “tuition reimbursement” program in place and an adequate amount of funding to cover it, whereas the Maryland program had been enacted in 1935, offered only 50 slots for qualified students, and could not meet the demand of the hundreds of applications that were received.

²⁹ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938).

³⁰ *id.*

³¹ *id.*

those states egregious enough to flout the holding in *Plessy* by not even providing *separate* facilities for minority students. Although tentative, it was nevertheless a critical advance, one that the justices deciding cases such as *Van Camp* and *State ex rel. Garnes* and *Cumming* could not have foreseen: legislatures and education boards, however much discretion they were afforded, could not, when offering higher education opportunities to whites, simply offer *nothing* to African-Americans. At the federal level, issues of access to education—for which the 19th century rule had always been one of deference to legislatures and statutory enactments—were now being considered in a more critical light.

From there, in a pair of cases litigated by Charles Hamilton Houston’s protégé Thurgood Marshall, the Court was forced to think more seriously about the resource disparities between segregated educational institutions. In a terse 1948 *per curiam* opinion in *Sipuel v. Board of Regents of Univ. of Okla.*, the Court ordered Ada Sipuel admitted to the University of Oklahoma Law School, the only taxpayer-funded law school in the state.³² In his brief to the Court, Marshall urged the justices to reexamine the holding in *Plessy v. Ferguson*, but they simply reaffirmed their prior holding in *Missouri ex rel. Gaines* with little discussion. But in *Sweatt v. Painter*, the Court confronted a more complicated question: What would be done in a situation where the state had created an educational facility that, while not the least bit *equal* in resources, nonetheless provided an equivalent “service” to African-Americans?

³² *Sipuel v. Board of Regents of Univ. of Oklahoma*, 332 U.S. 631 (1948). Prior to this case and based on the holding in *Missouri ex rel. Gaines*, Marshall had experienced mixed success at the state supreme court level in *State ex rel. Bluford v. Canada*, 153 S. W. (2d) 12 (1941) (holding that, when presented with a demand by an African-American student, the board of curators of Missouri’s Lincoln University either needed to establish the requisite degree program offered at the University of Missouri or admit the student to that university) and *State ex rel. Michael v. Whitham*, 165 S.W.2d 378 (1942) (holding that a Tennessee statute ordering the state’s board of education to create equivalent graduate programs to those at the University of Tennessee for African-Americans satisfied the US Supreme Court’s holding in *Missouri ex rel. Gaines*).

In *Sweatt v. Painter* (1950), the Court was asked to consider Herman Sweatt's petition for admission to the University of Texas Law School.³³ The state of Texas had, during the course of Sweatt's original lawsuit in 1946, made provisions to open a law school for African-American students that would have been adjunct to the University of Texas Law School itself. However, the "school," which lacked independent faculty, a law library of any sort, or accreditation, failed to open. A separate law school, based at the Texas State University for Negroes, opened in 1948 with "a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association; and one alumnus who has become a member of the Texas Bar."³⁴ This stood in stark comparison to the University of Texas Law School, which had a student body of 850, a library stocked with 65,000 volumes, 19 faculty members, money for scholarships, and affiliation with the prestigious Order of the Coif honor society.³⁵

Once again, Marshall in his brief pressed for reconsideration of *Plessy*. Chief Justice Fred Vinson, writing for the majority in *Sweatt*, praised the "excellent research and detailed argument presented in these cases" but noted that "we have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible."³⁶ Thus, in reaching a decision, the majority relied on an examination of the fundamental disparity in resources available between the two schools rather than on a detailed discussion of *Plessy*'s continuing viability. To this end, Vinson observed "in terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and

³³ *Sweatt v. Painter*, 339 U.S. 629 (1950).

³⁴ *id.* at 633.

³⁵ *id.*

³⁶ *id.* at 631.

similar activities, the University of Texas Law School is superior.”³⁷ Moreover, the school to which Texas would readily admit Sweatt was an “academic vacuum” where he would be denied the opportunity to interact with “85% of the population of the State...[including] most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”³⁸ As a result of these two factors—a lack of actual resources, as the benefit inhering to individuals from studying with “85% of the population of the state”—there was no “substantial equality” between the institutions, and so Sweatt was ordered to be admitted to the University of Texas Law School.

On the eve of *Brown*, this presented a very fascinating precedent. *Sweatt* was narrowly tailored in its holding, yet not in the presentation of the evidence the Court deemed important. Library volumes, numbers of full-time faculty, and even the racial complexion of the student body warranted attention when considering whether one institution was deemed “substantially equal” to another.³⁹ Surely the old rule of deferring to the legislature’s reasoned judgment, to be overturned only when that discretion had been abused, would have led to a favorable result for Texas in this case. It seems likely that Missouri, had it chosen to open just such a law school as Texas had opened, however under-staffed and under-supplied, might have prevailed against Gaines. But times were changing, and the Court was becoming more comfortable with the act of

³⁷ *id.* at 633.

³⁸ *id.* at 634.

³⁹ The statistical evidence presented in Marshall’s brief for the petitioner—more detailed by far than his work in *Sipuel*—paints an even grimmer picture. The NAACP litigation team had commissioned a report from Dr. Charles Thompson to make a “scientific study of the comparative educational facilities for Negroes and whites in Texas” (p. 68). Among some of the findings in Marshall’s report was the following: In 1943-44, \$11,071,490 in state, county and district funds was appropriated for higher education in Texas. The amount of \$10,858,018 was appropriated to white institutions, *i. e.*, \$1.98 per capita to every white citizen. The sum of \$213,472 was appropriated to Negro schools, or 23 cents per capita. The white institutions thus received 8.06 times more funds than were allocated to the Negro institutions” (p. 69). Marshall concluded the brief with a powerful statement regarding facilities inequality: “Whenever segregation is decreed and enforced, you will find inequality...[and the] results of authoritative studies prepared by educators, psychologists, legal scholars and social scientists are all in agreement with petitioner’s contentions that: *there can be no separate equality*” (p. 97).

explicitly making policy from the bench, a notion long championed by many Legal Realists.⁴⁰ *Brown* would mark another step forward in this process, and in many respects was the culmination of the Court's work in the field of education policy.

3.1.2 *Brown*: Justices as Policymakers

Brown v. Board of Education (1954) arrived at the Supreme Court as the consolidation of cases that had originated in four separate states. Owing to the significance and scope of the decision, a welter of briefs were filed, with arguments ranging from a demand for the overturning of *Plessy* to claims that the petitioners simply be admitted to the schools of their choosing. The Court, in reaching a unanimous opinion written by Chief Justice Earl Warren, made an important statement—but did so in a manner similar to that suggested by Chief Justice Vinson in the earlier *Sweatt* case, deciding the case so as to leave undisturbed as much constitutional jurisprudence as possible.

It was, in spite of that “cautious” approach, a remarkable document. Instead of examining the “intent of the framers” of the Fourteenth Amendment, the Court looked explicitly to recent developments in social science: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children...[and] whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.”⁴¹ Instead of merely announcing that *Plessy v. Ferguson* was legally unsound, Warren, relying on this “psychological knowledge” and “modern authority,”

⁴⁰ As, for example, articulated by Oliver Wendell Holmes, Jr., in *The Path of the Law*, 10 *Harvard Law Review* 457 (1897): “I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage.” Accessed at http://www.constitution.org/lrev/owh/path_law.htm.

⁴¹ *Brown v. Board of Education*, 347 U.S. 483 (1954) at 495.

wrote that “any language in *Plessy v. Ferguson* contrary to th[ese] findings is rejected.”⁴² Because the weight of the evidence indicated that separate facilities were “inherently unequal,” they violated the Equal Protection Clause of the Fourteenth Amendment. This left open a fascinating question: If the evidence had indicated that separate facilities *could be equal*, would they be unconstitutional?

In the course of his 1959 Oliver Wendell Holmes Lecture at the Harvard Law School, Herbert Wechsler remarked that *Brown v. Board of Education* was “an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned.”⁴³ Wechsler was concerned that *Brown*, like the desegregation decisions that had preceded it, was not rooted in a principled interpretation of the Fourteenth Amendment but rather a belief, buttressed by social statistics, that discrimination was harmful to the party being discriminated against.⁴⁴ He viewed this as both a potential weakness of the opinion, since it failed to articulate any “neutral principles” that could be applied systematically in subsequent cases. In that respect, it represented to him a prime example of Realist overreach—the Brandeis brief from *Muller v. Oregon* (1908) written into law.

Wechsler’s concerns are, of course, valid only insofar as one adheres to a belief that the so-called “legal model” informs the judicial decision-making process.⁴⁵ If that is indeed the case, the failure of *Brown* to provide “neutral principles” to be employed by courts faced with similar litigation is indeed problematic. But *Brown* was not some isolated incident; rather, it was the

⁴² *id.*

⁴³ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 *Harvard Law Review* 1, 32 (1959). This talk, like Learned Hand’s critique of due process adjudication of all sorts during the 1958 Holmes Lecture (later collected as *The Bill of Rights* (Cambridge, 1959)), sought to examine aspects of “progressive” jurisprudence that, however beneficent the intentions of the jurists who supported it, seemed to make little sense from a legal-philosophical standpoint.

⁴⁴ *id.* at 33.

⁴⁵ See, for example, Barry Friedman, “Taking Law Seriously,” 4 *Perspectives on Politics* 261 (June 2006). Friedman merely notes that positivist scholarship should have “normative bite”; others would go much further.

harbinger of things to come. The rule prior to *Brown* had been deference to legislative enactments regarding education; the rule after it demanded that courts make a policy decision, using social science data as well as constitutional pronouncements to justify their conclusions. It is critically important to understand this fact before examining the involvement of the courts in the complicated school finance litigation of the later 20th century. Whether they were merely operationalizing policy preferences or acting strategically in resolving these cases, jurists at the US Supreme Court and state supreme court level—courts of last resort—found themselves constrained by notions of *stare decisis* and the strictures of the “legal model” *only to the extent that they allowed themselves to be*.⁴⁶

3.2 THE “VOLTE-FACE”: SERRANO, RODRIGUEZ, ROBINSON AND THE “NEW JUDICIAL FEDERALISM”

Following the close of a decade spent trying to enforce the *Brown* mandate, a change in Court personnel at the beginning of the 1970s marked the start of a new direction in federal education jurisprudence. Led by Nixon appointee Warren Burger, the Court began to gradually curtail the utility of race-based Equal Protection Clause claims as a method of achieving school district equality. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), Chief Justice Burger,

⁴⁶ Although political scientists differ regarding whether an “attitudinal model” or a “strategic model” better characterizes judicial behavior, it is clear that the work of philosophers such as Ronald Dworkin and H.L.A. Hart does not serve as the prime mover behind their activities (the question of whether it *should be* is one for philosophers!). For a thorough discussion of the former model, see Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, 2002); for the latter, see Thomas H. Hammond, Chris W. Bonneau, and Reginald S. Sheehan, *Strategic Behavior and Policy Choice on the U.S. Supreme Court* (Stanford, 2005). The behavior of the appellate courts, which are more constrained and thus largely outside the scope of the present analysis, is described in David E. Klein, *Making Law in the United States Courts of Appeals* (Cambridge, 2002).

writing for the majority, held that the bussing of students within a single school district was constitutional.⁴⁷ In the course of reaching this holding, however, Burger made the following somewhat ambiguous remark: “Independent of student assignment, where it is possible to identify a ‘white school’ or a ‘Negro school’ simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown.”⁴⁸ One reading of this suggests that *the very nature of how the school was funded* could constitute a violation under the Fourteenth Amendment.

Statements such as this by the Court seemed to presage further steps into the realm of education policymaking: the Supreme Court could examine data presented in the record and reach a decision on the merits of the case. Furthermore, this appeared to be a task the Court was perfectly capable of undertaking: “The reconciliation of competing values in a desegregation case is, of course, a difficult task with many sensitive facets but fundamentally no more so than remedial measures courts of equity have traditionally employed.”⁴⁹ The Court, acting as an arbiter of competing policy visions, would be engaged in something little different than what “courts of equity” had traditionally done.

These were, however, false indicators, and provided readers with little information about how difficult the behind-the-scenes wrangling over the *Swann* opinion had been.⁵⁰ With cases such as *Milliken v. Bradley* (1974) and *Dayton Board of Education v. Brinkman* (1977), the

⁴⁷ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). In Bob Woodward, *The Brethren* (New York, 1979) pp. 340-343, the evolution of the opinion in *Swann* is discussed in considerable detail. Burger, who apparently had neither an understanding of nor much interaction with people from minority backgrounds, initially produced a draft that precluded all city-urban bussing; after reading it, the other justices prevailed upon him to soften the language in the opinion. Although they were successful in this instance, Burger’s original opinion would eventually become the Court’s position on the matter.

⁴⁸ *id.* at 18.

⁴⁹ *id.* at 33.

⁵⁰ See n. 47, *supra*.

Court limited legal redress only to those claimants who could demonstrate that their school district's administrators had intentionally separated black and white students.⁵¹ Districts that merely contained a preponderance of one racial group or another and, as a result, had *de facto* segregated schools, were not guilty of a constitutional violation and could not be consolidated to remedy the effects of decades of residential decisions made by private citizens. Derrick Bell, writing several years after *Milliken* and *Dayton*, presented a description of what he believed to have happened between 1954 and 1977: "The convergence of black and white interests [over the necessity of industrializing the South and improving the standing of the United States among the world community] that led to *Brown* had begun to fade...[despite the fact] that poor whites who opposed social reform as 'welfare programs' for blacks...[still had] employment, education, and social service needs that differ from poor blacks by a margin that, without a racial scorecard, is difficult to measure."⁵²

3.2.1 Wealth, Not Race?

Thus, although *Brown* marked a genuine turning point in race-and-class-conscious jurisprudence, its effect on the operation and funding of most school districts was minimal.⁵³ Moreover, in

⁵¹ *Milliken v. Bradley*, 418 U.S. 717 (1974) (limiting power of federal courts to mandate interdistrict remedies to address intradistrict racial disparities in enrollment); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) (holding that desegregation orders issued by courts should go no further than creating the racial mix that would have existed in the absence of the constitutional violations found to have occurred).

⁵² Derrick A. Bell, Jr. "Brown v. Board of Education and the Interest-Convergence Dilemma." 93 *Harvard Law Review* 518, 525-526 (1980).

⁵³ Paul Minorini and Stephen Sugarman "School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future" in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), pp. 35-36. In fact, the "massive resistance" offered by many Southern politicians (prompting, *inter alia*, the "Southern Manifesto" written by "Dixiecrat" Strom Thurmond and signed by 99 federal legislators) ensured that the reforms promised by *Brown* would take nearly a decade to implement. The key point of the "Manifesto" was one that would actually prove critical to the outcome of *San Antonio Independent School District v. Rodriguez*: "The original Constitution does not mention education. Neither does the 14th Amendment nor any other amendment. The debates

certain urban areas, the phenomenon of “white flight” in response to desegregation led to the diminution of tax revenues.⁵⁴ Even as the federal judiciary rethought the salience of race as a principal determinant of educational inequality, some sociologists in the late 1960s began to underscore the importance of wealth rather than race as the main determinant of life outcomes for students.⁵⁵ In doing so, they provided the statistical foundation for the attorneys who represented the Edgewood Concerned Parent Association (“ECPA”). The ECPA brought an Equal Protection Clause case, based on the grounds of discrimination based on poverty rather than race, against six Texas school districts that would reach the Supreme Court as *San Antonio Independent School District v. Rodriguez* in 1973.⁵⁶

Already the process of data collection had commenced: the first comprehensive study of national school performance and school funding, the *Equality of Educational Opportunity* report, compiled for the U.S. Office of Education under the legislative mandate of the 1964 Civil Rights Act.⁵⁷ The report assessed the availability of equal educational opportunities to children of

preceding the submission of the 14th Amendment clearly show that there was no intent that it should affect the system of education maintained by the States.” This point, of course, was accurate, but—as I have attempted to show in this chapter as well as the preceding one—is no more critical to the determination of cases involving education policy than the Court (or any court) wanted it to be.

⁵⁴ *id.* Also see Gary Orfield, “Conservative Activists and the Rush Toward Resegregation” in Jay P. Heubert (ed.), *Law and School Reform* (Yale, 1999), pp. 39-87. Orfield argues that today’s conservative “originalist” jurists are themselves every bit as “activist” as their liberal predecessors, and far more effective at pressing their policy claims because they cloak their “reforms” in language that indicates they are restoring an earlier “restrained” approach to decision-making rooted in what he views as false reverence for the “legal model.”

⁵⁵ Helen F. Ladd and Janet Hansen (eds.), “Shifting Expectations of School Finance,” pp. 19-21 in *Making Money Matter: Financing America’s Schools* (National Academy Press: Washington, D.C., 1999). In *Rich Schools, Poor Schools: The Promise of Equal Education Opportunity* (University of Chicago Press, 1968), sociologist Arthur Wise argued that the preeminence of the race-based *Brown* decision has linked inextricably the notion of race and inequality in the national consciousness, thereby obscuring attention from inequalities related to wealth but unrelated to race—this in spite of the fact that *Brown* and the prior desegregation cases used social statistics in a way that seemed to connect the two.

⁵⁶ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁵⁷ James S. Coleman, *Equality of Educational Opportunity Study*, (United States Department of Education, 1966). Computer file accessed 01-12-2010 from the University of Michigan Inter-university Consortium for Political and Social Research. The EEOS consisted of test scores and questionnaire responses obtained from first-, third-, sixth-, ninth-, and twelfth-grade students, and questionnaire responses from teachers and principals. Data on students included age, gender, race and ethnic identity, socioeconomic background, attitudes toward learning, education and

different race, color, religion, and national origin. Relying on a national sample of school test score data and student questionnaire responses, the report's principal investigator James Coleman concluded that environmental aspects of students' lives were more significant predictors of school achievement than the financial resources available to those schools, although the latter were not wholly insignificant.⁵⁸

While conceding the correctness of some aspects of *Equality of Educational Opportunity*, the sociologist Arthur Wise argued in his 1968 book *Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity* that one simply could not discount the invidious impact of spending inequalities.⁵⁹ Wise advanced the idea, later used by litigants in federal and state constitutional cases, that these "unequal per-pupil expenditures...may constitute a denial of equal protection."⁶⁰ He analyzed various standards of school funding before settling on a rigid "one dollar-one scholar" principle that he believed would guarantee equal opportunity to all students who were studying within a state system of education.

career goals, and racial attitudes. Scores on teacher-administered standardized academic tests reflected performance on tests assessing ability and achievement in verbal skills, nonverbal associations, reading comprehension, and mathematics. Data on teachers and principals included academic discipline, assessment of verbal facility, salary, education and teaching experience, and attitudes toward race. With regard to the possibility of true educational equality, Coleman wrote the following in "The Concept of Equality of Educational Opportunity," 38 *Harvard Educational Review* 7 (1968): "Complete equality of opportunity can be reached only if all the divergent out-of-school influences vanish, a condition that would arise only in the advent of boarding schools; given the existing divergent influences, equality of opportunity can only be approached and never fully reached. The concept becomes one of degree of proximity to equality of opportunity. This proximity is determined, then, not merely by the equality of educational inputs, but by the intensity of the school's influences relative to the external divergent influences" (21-22).

⁵⁸ Coleman also found, *inter alia*, that African-American students performed better in racially mixed classrooms and that, on average, spending in predominantly African-American schools was higher than it had been prior to *Brown*. The former finding was recently discussed and tested in Eric A. Hanushek, John F. Kain, and Steve G. Rivkin "New evidence about *Brown v. Board of Education*: The complex effects of school racial composition on achievement," 27 *Journal of Labor Economics* 349 (2009). While Hanushek et al. confirmed that a higher percentage African-American classmates has a small negative correlation with African-American achievement (as measured by test scores), they found that this same condition (a high percentage of African-American classmates) has a minimal effect on white students.

⁵⁹ Arthur Wise, *Rich Schools, Poor Schools: The Promise of Equal Education Opportunity* (University of Chicago Press, 1968). See also n. 55, *supra*.

⁶⁰ *id.* at 4. Wise premised this argument on the notion that "the quality of a child's education in the public schools of a state should not depend upon where he happens to live or the wealth of his local community" (xi).

Despite the cogency of this appeal, it did not offer advocates of education reform a rationale for spending *more* per-pupil in poorer areas. Early federal court challenges to school district funding systems relied on Wise’s approach, which mandated funding equalization, and were met with little success because courts refused to interfere in the allocation of revenue, which they continued to view as a legislative function.⁶¹ Taking his cue from the results of those cases, law professor John Coons outlined a theory in his 1970 book *Private Wealth and Public Education* that combined flexible fiscal neutrality with the claim that education was a fundamental right protected by the Constitution.⁶²

Coons participated in the oral argument for the key California Supreme Court case on school funding, *Serrano v. Priest* (1971), which predated *Rodriguez* by two years and was thus thought by many experts to provide some hints as to the result in that later case.⁶³ In *Serrano*, when faced with a class action brought by a group of students and parents seeking to have the state’s method of public school financing declared unconstitutional, the California Supreme Court accepted Coons’ argument. Relying primarily on the United States Constitution’s Fourteenth Amendment as its *ratio decidendi* (but noting in footnote 11 that the California Constitution’s own Equal Protection Clause also applied), that court, per Justice Raymond Sullivan, held that the state’s “[school] funding scheme invidiously discriminated against the poor because it made the quality of a child’s education a function of the wealth of his parents and

⁶¹*McInnis v. Shapiro* 293 F. Supp. 327 (N.D. Ill. 1968) (holding that district court could not determine judicially manageable standards to gauge what students’ needs were and whether they were being met) (1968); *Burrus v. Wilkerson* 310 F. Supp. 572. (W.D. Va. 1969) (holding that courts do not have the competence to “tailor the public moneys to fit the varying needs of these students throughout the state”) at 574.

⁶² John Coons, *Private Wealth and Public Education* (Cambridge, 1970). With regard to fiscal neutrality, Coons argued that the objectionable discrimination should be “based on school district poverty, rather than personal poverty, and was measured by the assessed value of property per pupil that a district could tax...” because this offset the problem of “large cities [that] often spent more on their students than the statewide average per pupil.”

⁶³Paul Minorini and Stephen Sugarman “School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future” in *Equity and Adequacy in Education Finance* (National Academy Press, 1999).

neighbors.”⁶⁴ Furthermore, the court rejected the defendants’ claim of a compelling interest in local control of the operation of these school districts, calling that form of control a “cruel illusion” that prevented residents in impoverished districts from exercising effective control over their schools.⁶⁵ Like most of the state constitutional decisions that followed it, *Serrano* would be reheard several times, but the court’s first rehearing of this case would not appear on its docket until after the Supreme Court had decided *Rodriguez*.

Rodriguez arrived at the Supreme Court under most auspicious circumstances, both due to the earlier result in *Serrano* and because the Texas federal court had accepted Coons’ arguments. According to some observers, “it appeared for a short time that the federal Constitution—and the Coons team’s [plan]—would play a central role in shaping America’s school finance system.”⁶⁶ The attorneys for the plaintiffs propounded their now-crystallized positions about education constituting a “fundamental right” and wealth a “suspect classification,” but the Court, with Justice Lewis Powell writing for the majority, refused to accept either argument. Instead, the Court held that although education is an important public service, it was not a fundamental right found anywhere in the Constitution. Moreover, the Court

⁶⁴ *Serrano v. Priest*, 487 P.2d 1241, 1244 (California 1971).

⁶⁵ *id.* at 1261. In both *Milliken v. Bradley* and *Dayton Board of Education v. Brinkman*, the US Supreme Court would enshrine “local autonomy” in matters related to school funding as a “vital national tradition,” remarking in *Milliken* that “no single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for the public schools and to quality of the education process.” 433 U.S. 406, 410 (1977); 418 U.S. 717, 741-742 (1974).

⁶⁶ Paul Minorini and Stephen Sugarman “School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future” in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), p. 39. The prospect of continued involvement by the courts was met with extreme trepidation by policymakers such as Daniel Patrick Moynihan, who believed that judges would do a poorer job than legislators when it came to handling such matters: “For the courts to order it is to risk scandal. The scandal may be simply stated. It is that of middle-aged and elderly men imposing social nostrums which recent social science [meaning, *inter alia*, the Coleman Report] has seriously questioned, if not demolished, and doing so slothfully, without having mastered the not always simple modes of analysis by which social scientists have developed the new evidence.” From “Equalizing Education: In Whose Benefit?” in Donald Levine and Mary Jo Bane (eds.), *The “Inequality” Controversy* (Basic Books: New York, 1975), p. 116. As for the answer posed to the question in the title of his essay, it was relatively simple: Teachers would benefit, in the form of higher salaries, but with little return on this investment. In spite of all this, Moynihan did heap praise on John Coons, referring to him as a “razor-sharp” man (p. 116).

explained that the funding disparities described in the case—Edgewood received \$389 fewer dollars per pupil than the much richer Alamo Heights district—did not exclude pupils from receiving these essential public services.⁶⁷ In other words, as long as *some* form of public education was available to students in the district, the Court would not find a constitutional violation. In a dissent joined by William Douglas and William Brennan, Thurgood Marshall offered a possible solution. First, he argued that the Court’s enumeration of fundamental rights should not be limited to rights specified in the Constitution. From there, he cited the Court’s precedent in *Sweatt v. Painter*—where the majority noted that no rational student would choose the under-funded, under-staffed African-American law school over the whites-only alternative—to buttress his argument that “it is difficult to believe that if the children of Texas had a free choice, they would choose to be educated in districts with fewer resources, and hence with more antiquated plants, less experienced teachers, and a less diversified curriculum.”⁶⁸ Finally, foreshadowing Justice Brennan’s later, grander call for action at the state level, Marshall wrote in

⁶⁷ *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 12 (1973). Powell summarized the disparities as follows: “The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State’s impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960—the lowest in the metropolitan area—and the median family income (\$4,686) is also the lowest.³⁰ At an equalized tax rate of \$1.05 per \$100 of assessed property—the highest in the metropolitan area—the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248.31 Federal funds added another \$108 for a total of \$356 per pupil. Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly ‘Anglo,’ having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000,³³ and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.”

⁶⁸ *id.* at 84.

a footnote that “nothing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”⁶⁹

Marshall’s remarks foreshadowed the deluge of state litigation that followed *Rodriguez*. *Serrano*, for example, was re-litigated throughout the 1970s.⁷⁰ In 1976, the California Supreme Court held that funding legislation passed in response to the first decision was insufficient because “local wealth [remained] the principal determinant of revenue.”⁷¹ Following this decision, the legislature implemented an equalization plan that narrowed the gap between high-revenue and low-revenue districts. But parity came at a price, as this program further inflamed anti-tax advocates such as Howard Jarvis and Paul Gann, who had begun organizing in the wake of the modernization of the state’s property tax system that had begun in the 1960s.⁷² Two years

⁶⁹ id. at 133 n.100. According to Woodward’s *The Brethren*, Marshall, “unhappy with the Court’s position” had “assigned one of his law clerks, among the best at the Court, to prepare a devastating legal analysis of the majority opinion.” When Lewis Powell asked his own clerks how Marshall had produced the opinion, they explained that the clerk had written it and “Marshall himself had spent maybe fifteen minutes to an hour going over the draft.” When asked by Powell about one of the key points made in the dissent, Marshall allegedly responded “Did I say that?” (pp. 311-312).

⁷⁰ The impact of *Serrano* was wide-ranging. When delegates at the Montana Constitutional Convention of 1971-1972 met to discuss new language for their education clause, the debate over this language centered on the degree of judicial oversight they wished to permit. Unlike at the 19th century conventions, where no evidence of future judicial consideration of these clauses appears to exist, the Montana delegates had *Serrano* well in mind. Gene Harbaugh, who supported the provision that had been drafted, said the following in response to delegates who wished to draft a provision that unequivocally left all matters concerning the functioning of the state’s school system to the legislature: “The last sentence of subsection two is directed toward the financing of the school system. Now, a great deal has been said about the *Serrano*-Priest case and other decisions across the land affecting the financing of the public school system. In analyzing our Montana finance structure, the committee found that there is a great disparity between the level of school financing among the various districts of the state...It’s our feeling that the state should make every effort to insure that insofar as it is possible, equality of financial expenditures for school children of our state is implemented.” 8 Montana Convention of 1971-1972 at 6016. The proposed language was accepted, and—as supporters like Harbaugh would not deny—indeed proved to be outcome-determinative in *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (1989) (holding that spending disparities among the various school districts of the state amounts to a denial of the equality of educational opportunity). This case, along with cases in Kentucky, Massachusetts, New York, and Vermont, will be discussed in greater detail later in this chapter.

⁷¹ *Serrano v. Priest*, 557 P.2d 929, 938-939 (California 1976).

⁷² As described in Isaac Martin, *The Permanent Tax Revolt* (Stanford University Press, 2008), p. 80: “The *Serrano* decision seemed to require a redistribution of property tax revenues that would further increase taxes in some wealthy districts. The decision thereby put the courts on a collision course with the property tax revolt.” Kirk Stark and Jonathan Zasloff deny that *Serrano* contributed much to the movement, despite the fact that it was frequently referenced in their public statements. In “Tiebout and Tax Revolts: Did *Serrano* Really Cause Proposition 13?” 50 *UCLA Law Review* 801, they use multiple regression analysis to support their claim that the measure passed because

later, they spearheaded a campaign that led to the passage of Proposition 13 by a considerable margin.⁷³ Proposition 13 added Article 13A to the state constitution, which capped *ad valorem* taxes on real property at one percent of the full cash value of the property, required a two-thirds vote for state tax increases, and prohibited the imposition of a statewide property tax.⁷⁴ The effect of this constitutional amendment on the legislature's equalization plan was significant, "requiring a totally new method of school funding skewed toward state funding...[that] essentially nullified the district power-equalizing plan adopted by the legislature." In less than a decade, overall school spending in California would fall below the national average.⁷⁵ More significantly, Proposition 13 now serves to limit local control of the schools by placing a *de facto* ceiling on their spending, an unintended result of a measure spurred largely by activists who were, at base, "localist" in their orientation.⁷⁶ As a consequence, many California districts have become reliant on state funds, which have varied from legislative session to legislative session, in order to meet their operating budgets.⁷⁷ The vicissitudes of partisan politics in Sacramento, coupled with several no-revenue or low-revenue growth years during the 1990s, has made it

"of institutional rigidities of the fiscal decisionmaking process [that] precluded a rational response to the extraordinary housing inflation of the early 1970s." William Blankenau and Mark Skidmore, "The Relationship between Education Finance Reform and Tax and Expenditure Limitations," 32 *Journal of Regional Analysis* 1 (2002) is *contra*. A fuller discussion of this specific incident is outside the scope of the present project, but it seems likely that *Serrano* factored into the process to a degree greater than what Stark and Zasloff suggest.

⁷³ Owing to the successful work of Jarvis and Gann, far more people with an interest in *passing* the measure showed up at the polls. It passed by a vote of 4,280,689 to 2,326,167. Martin, p. 80.

⁷⁴ California Constitution, Article 13A.

⁷⁵ Paul Minorini and Stephen Sugarman "School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future" in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), p. 49. This same narrative is presented in numerous other accounts. See, for example, Molly S. McUsic, "The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation" in *Law and School Reform* (Yale: New Haven, 1999), pp. 88-160. With regard to the possibility of challenging the *Rodriguez* holding, McUsic notes that "with a politically conservative federal judiciary there seems little potential anytime soon for a court-declared federal right to a changed school finance system" (p. 103).

⁷⁶ Jeffrey I. Chapman, *Proposition 13: Some Unintended Consequences* (Public Policy Institute, 2000).

⁷⁷ *id.* at 16: "In the past, local school districts were always heavily dependent on state aid (and faced state mandates). However, with Proposition 13 eliminating the ability of local school districts to raise property tax rates for their schools, and with Proposition 98 establishing a floor (or ceiling, depending on the economy and legislature), for all practical purposes, aggregate school finance is now almost entirely centralized at the state level, and school districts are now passive recipients of state revenues."

extremely difficult for the state to allocate sufficient money to the districts to raise per-pupil spending up to the national average.⁷⁸

3.2.2 The Turn to the States

Although it had been a groundbreaking decision for advocates of school funding reform, *Serrano* was not decided by means of an entirely novel reading of the California Constitution. As noted *supra*, the California justices based their decision on a reading of the U.S. Constitution, while noting only in a footnote that the California Constitution also applied. As the Burger Court slowed the Warren Court's so-called "rights revolution" that had resulted in decisions such as *Brown v. Board of Education*, many "activist" jurists and scholars came to view state constitutions and state supreme courts as another avenue through which individual rights and liberties could be expanded.⁷⁹ Justice William Brennan offered a notable early exhortation for state courts to "step into the breach" that he believed to have been left abandoned by the federal courts:

State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.⁸⁰

⁷⁸ *id.*

⁷⁹ For more on the "rights revolution," see Charles R. Epp, "Courts and the Rights Revolution," in Kermit Hall and Kevin McGuire (eds.), *The Judicial Branch* (Oxford, 2005), pp. 343-375. Of the Burger Court's position on education litigation, Epp writes: "The Court's decision in *Milliken v. Bradley* contributed to the rapid expansion of generally white suburbs around old urban core cities in such metropolitan areas as Detroit, Kansas City, St. Louis, and Atlanta, and contributed to the depth of already great disparities in public school financing" (p. 371).

⁸⁰ William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 489, 491, 502-503. This is, as noted *supra*, quite similar to the exhortation contained in Thurgood Marshall's dissent in *Rodriguez*. As cited (and first encountered) in Kermit Hall and Peter Karsten's *The Magic Mirror* (2d ed.: Oxford, 2007), Brennan's short speech also served as the starting point for this project.

Professor G. Alan Tarr, reflecting on the significance of Richard Nixon's appointments to the Supreme Court and the Burger Court's subsequent retrenchment on issues relating to civil rights, noted that this "encouraged civil liberties litigants to look elsewhere for redress...[which] suggests that, paradoxically, the activism of the Warren Court, which was often portrayed as detrimental to federalism, was a necessary condition for the emergence of a vigorous state involvement in protecting civil liberties."⁸¹ This "New Judicial Federalism," then, allowed for the articulation of a diverse body of state civil liberties jurisprudence.

Rutgers-Newark Law School professor Paul Tractenberg was one such scholar who came to believe that "state constitutional law could and should recognize a substantial right to equal educational opportunity" that was rooted in the "thorough and efficient" education clause of New Jersey's constitution rather than in any provision in the federal constitution.⁸² When asked to co-litigate a school finance lawsuit with Jersey City attorney Harold Ruvoldt, Tractenberg successfully persuaded the New Jersey Supreme Court to rely exclusively on the state constitution's education clause to justify its decision in *Robinson v. Cahill* (1973).⁸³ After analyzing a series of unhelpful federal precedents, Chief Justice Joseph Weintraub, writing for the majority in *Robinson*, undertook a historical evaluation of the New Jersey Constitution. His detailed analysis proceeds from a discussion of the niceties of late 19th-century taxation measures to the proceedings of a constitutional convention in 1947 where the delegates "did not act upon a

⁸¹ G. Alan Tarr, "The Past and Future of the New Judicial Federalism," 24 *Publius* 63, 72-73 (Spring 1994).

⁸² Michael Paris, *Framing Equal Educational Opportunity: Law and the Politics of School Reform* (Stanford, 2010), p. 66. New Jersey Constitution, art. IV, § 7: "The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

⁸³ *Robinson v. Cahill*, 303 A.2d 273 (New Jersey 1973). According to Michael Paris, Tractenberg and Ruvoldt were at odds about the goals of the litigation, with Ruvoldt favoring wealth neutrality and Tractenberg believing—as Arthur Wise had—in wealth equalization. The latter goal, Paris goes on to report in his monograph-length account of the still-ongoing New Jersey school finance litigation, proved rather problematic from a political standpoint (pp. 66-73). Tractenberg's continued devotion to "wealth equalization" is discussed in the concluding chapter of this text, in the context of the lengthy *Abbott v. Burke* (1985) litigation.

recommendation of the New Jersey Federation of Labor that education be funded out of State revenues.”⁸⁴ Finally, Weintraub claimed—as many justices have before and since—that history can only go so far in informing the decisions of the present: “It cannot be said the 1875 amendments were intended to insure statewide equality among taxpayers...[but] we do not doubt that an equal educational opportunity for children was precisely in mind.”⁸⁵

What mattered for Weintraub, then, were not the precise intentions of the various framers of New Jersey’s constitution, but rather the fact that their work on the subject of education evinced a generalized desire to afford all students an “equal educational opportunity.”⁸⁶ From there, he determined that, with regard to the significant dollar input per pupil discrepancies then obtaining in New Jersey, the state had not met its obligation to provide a “thorough and efficient” system of public schools.⁸⁷ Although he also articulated a qualitative requirement that the state afford students the “educational opportunit[ies] that will equip them for their role as citizens and as competitors in the labor market,” he then focused his attention on dollar inputs because there was “no other viable criterion for measuring compliance with the constitutional standard.”⁸⁸

After rejecting a “guaranteed tax base” plan proposed by newly elected Governor Brendan Byrne for fears that it would unduly weaken local control of public education,

⁸⁴ id. at 294.

⁸⁵ id.

⁸⁶ id. See the conclusion of the previous chapter for a discussion of the different ways that the 19th century education clauses might be understood. Here the intentions of the New Jersey Constitution’s various framers were a bit murkier, since several constitutional revisions may have altered the relationship between the public schools and the legislature, but it was not at all clear that the constitution imposed any affirmative duty on the legislature to remedy these per-pupil spending disparities. Weintraub and his colleagues decided that it did, and in the process engaged in “making law.”

⁸⁷ id. at 296.

⁸⁸ id. at 293, 296.

legislators passed the Public School Education Act of 1975.⁸⁹ This complicated plan allowed “each district [to] retain the authority to set its own school tax rate, while the state supplied aid sufficient to provide each district with the revenues it would have reaped from its chosen tax rate had its property wealth equalized 135 percent of the statewide average property wealth per student.”⁹⁰ It was “equalizing up to a point....[after which] wealthy districts would be free to spend as they wished, and they would still be receiving other forms of state aid.”⁹¹ Following the implementation of this plan, several urban school districts, prompted by Paul Tractenberg, immediately sued the state to remedy funding disparities left unaddressed by PSEA. These suits would persist through five additional iterations of *Robinson* and over *twenty-one* versions of the companion *Abbott v. Burke* litigation.⁹² Although successful in terms of their courtroom results—the plaintiffs have almost always prevailed, and the New Jersey legislature is still under a judicial mandate to “equalize” funding in the state’s poorest and wealthiest districts—they have prompted considerable criticism from scholars and politicians, and will be discussed in greater detail in the “remedies” section of the concluding chapter.⁹³

⁸⁹ Paris at 70-71.

⁹⁰ Paul Enrich. “Leaving equality behind: New Directions in school finance reform,” 48 *Vanderbilt Law Review* 101, 132 (1995).

⁹¹ Paris at 71.

⁹² Beginning with *Abbott v. Burke*, 100 New Jersey 296 (1985) (holding that the education provided to school children in poor communities was inadequate and unconstitutional and mandating that state funding for these districts be equal to that spent in the wealthiest districts in the state) and continuing all the way up to *Abbott v. Burke*, M-1293-09, May 2011.

⁹³ The most recent and notable critic has been Republican Governor Chris Christie (see Richard Pérez-Peña and Winnie Hu, “Court Orders New Jersey to Increase Aid to Schools” in *The New York Times*, 05-24-2011) but see also Eric A. Hanushek (ed.), *Courting Failure: How School Finance Lawsuits Exploit Judges’ Good Intentions and Harm Our Children* (Hoover Institution Press: Palo Alto, 2006).

3.2.3 Horton v. Meskill, Pauley v. Kelley and the Uneasy 1980s

Although it prompted more litigants to commence school finance lawsuits at the state level, the New Jersey Supreme Court's decision in *Robinson* did not inspire an immediate renaissance of state constitutional jurisprudence regarding the issue of school finance. Most of the other major lawsuits brought in the 1970s failed. State supreme courts in Oregon, Idaho, Ohio, and Pennsylvania either refused to intrude on matters reserved for their states' legislatures or were unwilling to deviate from federal courts' interpretations of this issue.⁹⁴ However, as the decade drew to a close, the supreme courts of Connecticut and West Virginia broke new jurisprudential ground: in addition to mandating that their state legislatures reform unequal school funding systems, they also declared education to be a fundamental right belonging to all of their citizens.⁹⁵

In Connecticut, an attorney whose son attended kindergarten in Canton Elementary School brought a lawsuit alleging the unconstitutionality of the state's method of financing its schools.⁹⁶ When the case reached the Connecticut Supreme Court in 1977, the majority, per Justice Charles House, held in the plaintiffs' favor in most unambiguous language: "We

⁹⁴ *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *Olsen v. State*, 554 P.2d 139 (Idaho 1976); *Board of Educ. v. Walter*, 390 N.E. 2d 813 (Ohio 1981); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979). The *Thompson* court refused to accept the argument that school funding had anything to do with educational quality, while the *Danson* court held that these issues were non-justiciable. *Walter* is discussed in greater detail in the next chapter.

⁹⁵ *Horton v. Meskill*, 172 Connecticut 615 (1977); *Pauley v. Kelly*, 162 West Virginia 672 (1979). *Seattle School District No. 1 v. State*, 585 P.2d 71 (Washington 1978) constituted another victory for plaintiffs seeking to have their state's system of school financing overturned. Instead of finding that education was a "fundamental right," however, the Washington Supreme Court interpreted Article 9, Section 1 of its state constitution to impose a "paramount duty" on the legislature to "make ample provision" for the education of resident children. The majority explicitly recognized that it was altering the letter, but not the spirit, of the constitutional provision at issue: "However, to recognize changing times is not to change the constitution. Quite the contrary. We must interpret the constitution in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning. It is the judiciary's duty to ensure that the constitution does not become 'a magnificent structure . . . to look at, but totally unfit for use.'" *id.* at 96.

⁹⁶ *Horton v. Meskill*, 172 Connecticut 615 (1977).

conclude that without doubt the trial court correctly held that, in Connecticut, elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right, and that the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of ‘strict judicial scrutiny’ as to its constitutionality.”⁹⁷ The way that House reached his conclusion is especially important. Instead of examining the intent of the framers, he offered his particular interpretation of the *Rodriguez* case.⁹⁸ After referencing Justice Marshall’s dissent in *Rodriguez* in which he exhorted future plaintiffs to look to state courts for redress, House then recapitulated the “test” presented in that case for whether education constituted a “fundamental right” and its unhelpfulness in this situation: “The answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution...[but we find this] test for the fundamentality of the right to an education of no particular help, although under that test it cannot be questioned but that in the light of the Connecticut constitutional recognition of the right to education (article eighth, s 1) it is, in Connecticut, a ‘fundamental’ right.”⁹⁹ From there, he explained that “educational equalization cases are in significant aspects *sui generis* and not

⁹⁷ *id.* at 649.

⁹⁸ Indeed, the framers had no intention of creating such a right, as Justice Loisel correctly explains in his dissent: “As I review the history of education in Connecticut, it does not support the “fundamentality” of the right. Education was not required to be free until 1869. Public Acts 1869, c. 71; compare with Rev. 1866, tit. 16, c. 3, s 98. In 1894, this court spoke of education as a privilege or advantage, rather than a right in the strict technical sense of the term: ‘This privilege is granted, and is to be enjoyed upon such terms and under such reasonable conditions and restrictions, as the law-making power, within constitutional limits, may see fit to impose; and, within those limits, the question what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools, is a question solely for the legislature and not for the courts.’ The history of the addition of the provision on education to our constitution in 1965 is, like most legislative history, ambiguous. Statements made at the constitutional convention could be interpreted either way depending upon which point of view is fostered. Taken as a whole, this history is indicative of what the majority opinion has stated, that the constitutional amendment regarding free education on the elementary and secondary level was merely a ‘codification’ of the obligation assumed by the state in its statutory enactments. The constitutional provision would prevent the state from requiring students to pay for education or from denying free education to some while making it available to others, but I do not see that the provision renders education a ‘fundamental’ right.” *id.* at 656-657. None of this, however accurate, prevented the *Horton* majority from declaring that it was, nor could it have.

⁹⁹ *id.* at 641.

subject to analysis by accepted conventional tests or the application of mechanical standards.”¹⁰⁰ It was left to the courts, then, to fashion a remedy to “the present-day problem aris[ing] from the circumstance that over the years there has arisen a great disparity in the ability of local communities to finance local education, which has given rise to a consequent significant disparity in the quality of education available to the youth of the state.”¹⁰¹

House ordered no specific relief, but wrote his opinion in such a way as to indicate that all future legislation pertaining to education would be treated by Connecticut courts with “strict scrutiny” (i.e., the state would have the burden of showing it must meet a “compelling interest” in defending the litigation). Eight years later, however, this standard of review was challenged and qualified in the third rehearing of *Horton*. Chief Justice Ellen Ash Peters, writing for the majority, explained her decision as follows: “The *sui generis* nature of litigation involving school financing legislation militates against formalistic reliance on the usual standards of the law of equal protection, in particular against the requirement that the state must demonstrate a compelling state interest.”¹⁰² In place of this traditional standard of review, the court adopted the three-part test used in Supreme Court cases on the issue of legislative reapportionment, one requiring the plaintiffs to make a *prima facie* case showing persistent meaningful disparities that are jeopardizing the fundamental right to education, after which the burden would shift to the state to show how the continuing disparities created by the challenged legislation advance a legitimate state interest. Remedial hearings on compliance with judicial rulings would require the trial to engage in a balancing test that would attempt to align the rights of the plaintiffs with

¹⁰⁰ id. at 645.

¹⁰¹ id. at 648.

¹⁰² *Horton v. Meskill*, 195 Connecticut 24, 35-36 (1985).

“the need to avoid embarrassment to the operation of government.”¹⁰³ This was, of course, a concession to the realities of the process of interacting with other coequal branches of government; such concessions are the leitmotif that unifies all of this post-*Rodriguez* litigation. Political scientist Douglas Reed viewed the actions of the court in a positive light: “The court demonstrated an astute capacity for political learning...[and] the flexibility allowed the judiciary to exercise influence over school finance reform but in a more nuanced way.”¹⁰⁴ It most assuredly did not end the struggle over school funding in Connecticut, of which more will be said in section 3.3, *infra*.

The West Virginia Supreme Court of Appeals also reached the conclusion that education was a fundamental right of resident students, yet arrived at that decision in a markedly different way.¹⁰⁵ Writing for the majority, Justice Sam Harshbarger focused on the origins of the “thorough and efficient” education clause in the West Virginia Constitution.¹⁰⁶ Wary of deciding the case entirely on equal protection grounds, Harshbarger found merits in the method of historical analysis used by the *Robinson* majority: “Our research produced useful dialogues in the [19th-century] Ohio and West Virginia Conventions, and we have included abbreviated parts in this opinion.”¹⁰⁷ His analysis of the Ohio Convention, which first adopted the “thorough and efficient” language that West Virginia and other states borrowed, centered on snippets of delegate dialogue that suggested to him that education was intended to be a paramount function of that state—statements along the lines of education being “an important function of the state,” “of inestimable value for raising up an informed public,” etc.—and then traced the adoption of

¹⁰³ *id.* at 45.

¹⁰⁴ Douglas Reed, *On Equal Terms* (Princeton, 2002), p. 81.

¹⁰⁵ *Pauley v. Kelly*, 162 West Virginia 672 (1979).

¹⁰⁶ “The legislature shall provide, by general law, for a thorough and efficient system of free schools.” West Virginia Constitution, art. XII, sec. 1.

¹⁰⁷ *Pauley* at 684. Of the Ohio Convention of 1851 and *Pauley*’s impact on future discussions of it, more is said in the next chapter.

this clause by other states and its interpretation by their courts. After concluding that the weight of the decisions indicated the “plenariness” of legislative authority in matters relating to education, Harshbarger turned to *Robinson v. Cahill* as well as dictionary definitions of “thorough” and “efficient” to justify the majority’s conclusion that education was a fundamental right.¹⁰⁸ He concluded with two helpful remarks, the first a simple formula for a state assistance package to public schools that would pass constitutional muster and the second a clear statement of what constituted a “thorough and efficient” education in West Virginia:

We may now define a thorough and efficient system of schools: It develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically. Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.¹⁰⁹

This was, of course, a powerful vision, but as in Connecticut, litigation would continue throughout the decade as plaintiffs sought to determine the contours of Harshbarger’s

¹⁰⁸ id. at 700: “A Complete and Universal English Dictionary, by Rev. James Barclay, London, Richard Edwards, 1815, defines ‘thorough’: ‘(T)he word through extended into two syllables . . . complete; passing in at one side, and beyond the other . . .’ It defines ‘efficient’: ‘(A) cause; one that makes or causes things to be what they are . . . having the power to produce or cause alteration or change in things, either by altering the qualities, or in introducing new ones . . .’ (at 326) Webster’s Third New International Dictionary, Unabridged, G. & C. Merriam Company, Springfield, Mass., 1976, definitions are: ‘Thorough . . . marked by completeness; . . . carried through to completion especially with full attention to details; . . . marked by sound systematic attention to all aspects and details; . . . complete in all respects . . .’ ‘Efficient . . . marked by ability to choose and use the most effective and least wasteful means of doing a task or accomplishing a purpose: competent . . . marked by qualities, characteristics, or equipment that facilitate the serving of a purpose or the performance of a task in the best possible manner; eminently satisfactory in use . . .’ *Lexically, then, the words have not changed. The mandate, incorporating the sense of the definitions, becomes a command that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters. And further, it must produce results without waste (emphasis added).*”

¹⁰⁹ id. at 706. This definition warrants comparison with the one offered by the Kentucky Supreme Court in *Rose v. Council for Better Education*, 790 S.W2d 186 (Kentucky 1989), discussed *infra*.

pronouncement.¹¹⁰ It was also, despite the somewhat anachronistic nature of the historical analysis used to buttress it, a thoroughly defensible conclusion about the *spirit* in which these mid-19th century education clauses had been drafted.¹¹¹

Horton and *Pauley* were not entirely anomalous, but throughout most of the 1980s, “judicial restraint and deference to the legislative process—the *Rodriguez* perspective—continued to characterize most judicial decisions.”¹¹² Plaintiffs during this period typically framed their cases in two ways: first, that education, based on the state constitutional education provision at issue, constituted a “fundamental right”; and second, that educational “equity”—the near-equalization of school district expenditures—was compelled by the equal protection clauses in those states’ constitutions.¹¹³ Between 1980 and 1988, reformers using these arguments encountered a host of setbacks at the state supreme court level.¹¹⁴ While most of these adverse decisions were decided in accordance with federal precedents, those courts that did examine their

¹¹⁰ e.g., in *Pauley v. Bailey*, 171 West Virginia 651 (1983); *Pauley v. Bailey*, 174 West Virginia 167 (1984); *Pauley v. Gainer*, 177 West Virginia 464 (1986). The latter two cases concerned the responsibilities of state superintendent of schools and the governor, respectively, to foster a “thorough and efficient” system of education. In 2003, Governor Robert Wise, who had been a witness for the plaintiffs during the initial *Pauley* case, would sign papers officially ending the process of school finance litigation in West Virginia. Reflecting on *Pauley* at a conference at Columbia Teachers College in 2007, he said, “What I observed in our proceeding as it unfolded over twenty years was that the court pushed, but it stopped short of provoking a constitutional crisis whenever it could. The legislature was always trying to stay just far enough ahead....to avoid a contempt citation...So over the fifteen to twenty years, the judge was able to get the legislature and the governors to move significantly, but at the same time, the legislature could say, ‘You can’t tell us fully what to do.’ Where the court runs short, I believe, is in its ability to enforce.” Quoted in Michael Rebell, *Courts and Kids* (Chicago, 2009), p. 119.

¹¹¹ The distinction between the “framers’ intent” and the larger meaning of these clauses is the subject of the conclusion of the previous chapter.

¹¹² Paul Minorini and Stephen Sugarman “School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future” in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), p. 55.

¹¹³ See “Equity I—Spending on Schools” in Helen F. Ladd and Janet S. Hansen, *Making Money Matter*, pp. 83-88 for a thorough summary of “equalization” efforts during this period.

¹¹⁴ In the following cases, state supreme courts upheld their states’ school funding systems: *McDaniels v. Thomas*, 285 S.E.2d 156 (Georgia 1981); *Levittown v. Nyquist*, 439 N.E.2d 359 (New York 1982); *Lujan v. Co. Bd. Of Educ.*, 649 P.2d 1005 (Colorado 1982); *East Jackson v. Michigan*, 348 N.W.2d 303 (Michigan App. 1984); *Fair School v. Oklahoma*, 746 P.2d 1135 (Oklahoma 1987); *Britt v. North Carolina*, 357 S.E.2d 432 (North Carolina 1987); *Richland v. Campbell*, 364 S.E.2d 470 (South Carolina 1988). During this period, state supreme courts in Wyoming and Arkansas held their states’ school funding systems to be unconstitutional: *Washakie Co. Sch. Dist. v. Herschler*, 606 P.2d 310 (Wyoming 1980); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Arkansas 1983).

states' education clauses did not read them as mandating school financing equity.¹¹⁵ “For the present, solutions to serious disparities in educational opportunities must come from our lawmakers,” wrote the Georgia Supreme Court in 1981.¹¹⁶ A year later, the Colorado Supreme Court, after acknowledging that “while it is clearly the province and duty of judiciary to determine what the law is,” proceeded to hold that “the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of General Assembly...[but also] expressly mandated by the Colorado Constitution.”¹¹⁷ In 1987, the Oklahoma Supreme Court rejected a lawsuit brought by plaintiffs on equal protection grounds: “We find that neither the United States nor the Oklahoma Constitution requires the school funding regime to guarantee equal expenditures per child, at least where there is no claim that the system denies any child a basic, adequate education.”¹¹⁸ As cases built on arguments claiming equal protection violations or attempting to characterize education as a fundamental right failed to make headway in most state courts, “the concept of an ‘adequate education’ moved to center stage in [legal] discussions of fairness in school finance systems.”¹¹⁹

¹¹⁵ J.K. Underwood. “School finance equity as vertical equity,” 28 *University of Michigan Journal of Law Reform* 493, 500 (1995).

¹¹⁶ *McDaniels v. Thomas*, 285 S.E.2d 156, 168 (Georgia 1981).

¹¹⁷ *Lujan v. Co. Bd. Of Educ.*, 649 P.2d 1005, 1025 (Colorado 1982).

¹¹⁸ *Fair School v. Oklahoma*, 746 P.2d 1135, 1151 (Oklahoma 1987).

¹¹⁹ “Equity II—The Adequacy of Education” in Helen F. Ladd and Janet S. Hansen, *Making Money Matter*, p. 101.

3.3 FROM EQUITY TO ADEQUACY, 1989-2000

In 1989, the Kentucky Supreme Court reignited the process of state constitutional reform by declaring its state's entire education system to be unconstitutional.¹²⁰ The court in *Rose v. Council for Better Education* held that its state constitution's education clause mandated equal access to adequate educational opportunities for all students.¹²¹ Based on the set of guidelines for what constitutes an adequate education limned by the court in its opinion, the Kentucky legislature enacted reform legislation that "increased the per-pupil expenditure statewide...[and] mandated a new statewide performance-based assessment system tied to new content-education standards, [a] statewide curriculum framework...[and] school-based decision-making statewide."¹²²

This case had the effect of establishing adequacy—as opposed to the notions of equity or wealth equalization advocated by John Coons and mandated in *Serrano v. Priest*—as "a distinct theory in school finance litigation."¹²³ In an influential journal article, former Coons associate William Clune defined adequacy as a "high-minimum" system of finance that meets the needs of a diverse class of students.¹²⁴ Instead of comparing and then equalizing spending in districts, a

¹²⁰ *Rose v. Council for Better Educ.*, 790 S.W. 2d 186 (Kentucky 1989).

¹²¹ See M. Heise. "State constitutions, school finance litigation, and the 'third wave': From equity to adequacy," 68 *Temple Law Review* 1151, 1160 (1995) for a fuller discussion of the efficacy of this case as persuasive authority in other jurisdictions.

¹²² Paul Minorini and Stephen Sugarman, "School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future" in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), p. 59. The guidelines stated that students should have a "sufficient" knowledge of economic and political systems, governmental processes, physical and mental wellness, history and art, oral and written communication skills, academic skills, and vocational skills.

¹²³ Paul Minorini and Stephen Sugarman, "Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm" in *Equity and Adequacy in Education Finance* (National Academy Press, 1999), p. 195.

¹²⁴ See William Clune, "New Answers to Hard Questions Posed by *Rodriguez*: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy," 24 *Connecticut Law Review* 721, 728 (1992): "In the time since *Rodriguez*, the theoretical problem of cost/quality has been considerably

state would spend what is needed in each district to achieve the appropriate outputs.¹²⁵ This movement toward “adequacy” as a litigation strategy addressed what Peter Enrich described as the two most significant problems with “equity” arguments: “First, despite the appealing apparent simplicity of the concept of equality, the task of specifying its precise content in the context of education funding turns out to be devilishly difficult...[and] second, when deployed in relation to a subject as important, and as emotive, as education, equality—whatever its precise meaning and whatever its centrality among our shared societal and legal norms—can suddenly loom too large, threatening to demand too much and to overwhelm other important concerns.”¹²⁶

Plaintiffs who used versions of “adequacy” arguments would successfully litigate many subsequent cases; the period after *Rose* featured several notable successes at the state level. The supreme courts of Massachusetts, New York, and Ohio followed the Kentucky decision, relying on the definition of adequacy found in *Rose* to justify their decisions.¹²⁷ Texas and Vermont also held their state education systems to be unconstitutional during this period, using equity definitions that at various points appeared mixed with adequacy notions.¹²⁸

clarified. The heavy influence of student and family inputs on achievement, revealed in the once-shocking Coleman report is now accepted as obvious and considered no obstacle to the educational policy goal of improving student achievement. The focus now is not on making students absolutely equal with each other but rather on providing a gain in achievement from particular kinds of schools, classrooms, teaching, and educational programs. And the possibility of gain is actually quite clear. Certain kinds of schools, classrooms, teachers, and programs produce substantial gains in student achievement, as well as other valuable educational outcomes (like staying in school)... Because there really is no spending level that can be specified as ‘correct’ in either a constitutional or a policy sense, the rule of fiscal neutrality states simply that the same kind of decision be made for all the children in the state—a decision free from the influence of local wealth. The core of the wrong identified in school finance litigation is not the deprivation of any particular level of education but the deprivation of a fair decision about the spending level.”

¹²⁵ See also William Clune, “The shift from equity to adequacy in school finance,” 8 *Educational Policy* 376, 394 (1994) for a recapitulation and refinement of the above argument.

¹²⁶ Paul Enrich. “Leaving equality behind: New Directions in school finance reform,” 48 *Vanderbilt Law Review* 101, 145 (1995).

¹²⁷ *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (Massachusetts 1993); *Campaign for Fiscal Equity v. State of New York*, 86 New York 2d 307 (1995); *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997). The first two cases are discussed *infra*; *DeRolph* is the subject of the next chapter.

¹²⁸ *Edgewood v. Kirby* 777 S.W.2d 391 (Texas 1989); *Brigham v. State*, 692 A.2d 384 (Vermont 1997). These cases are discussed in greater detail later in the chapter.

3.3.1 The Tide Turns in 1989: Montana, Kentucky, and Texas

Though it would prove to be a landmark year for “adequacy”-based school finance litigation, 1989 commenced with one of the most notable “equality”-based decisions of the decade. In *Helena Elementary School District No. 1 v. State*, the Montana Supreme Court, with Justice Weber writing for the majority, held that the state’s system of funding its public schools violated Article X of its state constitution.¹²⁹ Article X, which had been drafted during the state’s contentious 1971-1972 constitutional convention, contained the following language: “Equality of educational opportunity is guaranteed to each person of the state.”¹³⁰ During the convention, delegates had quarreled over the wording of this provision, with some worrying that it left the state open to a school finance lawsuit like the contemporaneous *Serrano v. Priest* decision. Some of those who supported the provision agreed that such an outcome was possible, perhaps even likely, and not necessarily unwelcome.¹³¹ For once, the State’s argument that the “framer’s intentions” militated against such a finding that the provision in question was “an aspirational goal only” was clearly contradicted by the record.¹³² As such, the case required no analysis beyond a plain reading of the text of the Article X: equality had been explicitly guaranteed here, and so an argument alleging inequality of educational opportunity, when coupled with clear evidence that Montana’s Foundation Plan was under-funded, was sufficient to prove a

¹²⁹ *Helena Elementary School District No. 1 v. State*, 236 Montana 44 (1989).

¹³⁰ Montana Constitution, Article X, Section 1.

¹³¹ “Now, a great deal has been said about the Serrano-Priest case and other decisions across the land affecting the financing of the public school system. In analyzing our Montana finance structure, the committee found that there is a great disparity between the level of school financing among the various districts of the state...It’s our feeling that the state should make every effort to insure that insofar as it is possible, equality of financial expenditures for school children of our state is implemented.” 8 Montana Convention of 1971-1972 at 6016. See n. 71, *supra*.

¹³² *Helena Elementary School* at 52.

constitutional violation.¹³³ It would not, however, “spell out the percentages which are required on the part of the State under the Foundation Program and for the districts under the voted levy system...[because] we are not able to reach that type of a conclusion...[and] the control of such funds is primarily in the Legislature.”¹³⁴

Thus, while interesting from a historical perspective, *Helena* offered little in the way of policy advice. In fact, the court’s conclusion was no different than those reached by courts for decades: allocating revenue is a matter left to the legislature. All that had occurred here was an instance of a court saying that *this particular allocation* would not pass muster. This decision led, as expected, to subsequent litigation, and a “final” determination of the issue would not occur until 2005.¹³⁵

In June of that year, a very different sort of school finance lawsuit was decided. The chief litigator on the case was not, like John Coons and Paul Trachtenberg, an “ivory-tower” sort of academic; it was former Kentucky governor Bert T. Combs.¹³⁶ It was not brought by a handful of school districts and plaintiffs; it was supported by dozens of school districts from all corners of the state, coordinated through two well-organized not-for-profit education coalitions.¹³⁷ And the result was one of the first triumphs of the “adequacy” litigation strategy, one that would

¹³³ The court had no need to go further in its analysis: “Because we have concluded that the school funding system is unconstitutional under Art. X, Sec. 1, Mont. Const., we do not find it necessary to consider the equal protection issue. We therefore make no decision with regard to the findings of fact and conclusions of law relating to the equal protection of the laws analysis of the District Court, and in particular do not rule upon the determination by the District Court that education is a fundamental right.” *id.* at 55.

¹³⁴ *id.*

¹³⁵ In *Columbia Falls School District No. 6 v. State*, 326 Montana 304 (2005), the Montana Supreme Court was faced with a similar lawsuit relating to another state education bill. Here the court once again concluded that the system of public school financing laid out in the bill was unconstitutional, but noted—as it had failed to do in *Helena Elementary School*—that it could not adjudicate future education lawsuits until the legislature provided an objective definition of what constituted a “quality” education under the terms of Article X, Section 1. When the Montana District Court first heard this case in January 2004, I was employed as a “permanent” substitute physical education teacher in both the Columbia Falls and Flathead (Kalispell) school districts.

¹³⁶ Paris, *Framing Equal Opportunity* at 172. Combs was, however, ably assisted by education law expert Kern Alexander, who also participated in the *DeRolph* litigation discussed in the next chapter.

¹³⁷ *id.*

reverberate throughout the next decade as other jurisdictions accepted Kentucky Supreme Court's holding as persuasive authority.¹³⁸

Rose v. Council for Better Education, then, was handed down with bipartisan support, with the backing of many school districts, and in a state where both the legislature had been trying to pass education reform legislation for over a decade. Chief Justice Robert Stephens, writing for the majority, seized upon *Brown* as inspiration for the decision: ‘*Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms,*’ [wrote Chief Justice Warren] and these thoughts...and the goals

¹³⁸ Three things need to be said here about the “adequacy” standard. The first is that it is clearly more palatable for state supreme court justices, since, according to Ladd and Hansen in *Making Money Matter*, it “places far more emphasis on outputs and outcomes than wealth neutrality and spending equalization” (p. 102). The second is that, even among the courts and litigators who have advanced this theory, there is very little consensus on what it means beyond the fact that many Americans—who seem uncomfortable with the notion of a truly egalitarian society—are more accepting of it. The third—and most important for my purposes in the present paper—was made in a recent paper in *Education Economics*: Although both adequacy and equity “wins” for plaintiffs “decrease resource inequities” (no mention is made of student outputs; that is not the subject of the work), lawyers and legal theorists who have argued that the latter is somehow “better” for students than the former are wrong, because “resource distribution patterns following court-mandated equity and adequacy reforms are not statistically different.” Matthew Springer, Keke Liu, and James W. Guthrie, “The impact of school finance litigation on resource distribution: a comparison of court-mandated equity and adequacy reforms,” 17 *Education Economics* 421 (December 2009). This finding informs my historical treatment of these two standards: while it is certainly noteworthy that “adequacy” has proved more successful than “equity,” the analytical distinctions between these two theories—such as they are—are largely irrelevant. This is also what I have concluded about education clauses in state constitutions. In spite of the efforts of scholars such as William Thro to place them into “categories” based on the nature of the language (obviously hortatory, semi-obligatory, etc.), this has had absolutely no impact on how the justices tasked with interpreting them have actually behaved. See William Thro, “To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Litigation,” 75 *Virginia Law Review* 1639; and Karen Swenson, “School Finance Reform Litigation: Why are Some State Supreme Courts Activist and Others Restrained?” 63 *Albany Law Review* 1147 (1999), where, *inter alia*, Thro’s “categories” of education clause are tested to see if “stronger” education clauses are outcome-determinative in this litigation. Swenson concludes that, even though “courts appear to put considerable effort into comparing their state constitution’s education clause to the education clauses of other states, and in consulting the constitutional interpretations of sister state high courts...it appears that deference to another state’s constitutional law is a random event.” (1175). My own research seems to confirm the correctness of this conclusion. Consider the examples of West Virginia (where education is a “fundamental right”), Ohio (where students are entitled to an “adequate education”), and Pennsylvania (where decisions regarding education spending are left to the discretion of the legislature): all three of these states have education clauses with “thorough and efficient” language, with West Virginia and Pennsylvania having modeled their clauses on the Ohio clause. For a further discussion of the unhelpfulness of relying solely on the wording of these clauses to determine their present meaning, beyond what they tell us, historically speaking, about which group of people (“citizens,” “whites,” “all people,” etc.) were entitled to *access to education* (and how much, if anything, that education should *cost*), please refer to the previous chapter.

they express reflect the goals set out by the framers of our Kentucky Constitution.”¹³⁹ After proceeding to summarize the state of school funding in Kentucky, Justice Stephens presented readers with a rhetorical question: “Can anyone seriously argue that these disparities do not affect the basic educational opportunities of those children in the poorer districts?”¹⁴⁰

Stephens thereafter turned to the remarks made by delegates at the state’s 1890 constitutional convention regarding the education provision at issue. He paid especial attention to the comments of one Delegate Beckner, who, in terms of defining “equality”, stated rather vaguely (but helpfully, for Stephens’ purposes) that “it [means] a system of practical equality in which the children of the rich and poor meet upon a perfect level and the only superiority is that of the mind.”¹⁴¹ Following his discussion of Kentucky precedents, he looked to the *Pauley*

¹³⁹ *Rose v. Council for Better Education*, 790 S.W2d 186, 189 (Kentucky 1989), quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

¹⁴⁰ *id.* at 198. Stephens’ summary was concise and poignant: “When one considers the use of property taxes as a percent of sources of school revenue, Kentucky is 7th among our neighboring states and 43rd nationally. The national average is 30.1% while Kentucky’s rate is 18.2%. If any more evidence is needed to show the inadequacy of our overall effort, consider that only 68.2% of ninth grade students eventually graduate from high school in Kentucky. That ranks us 7th among our eight adjacent sister states. Among the 6 of our neighboring states that use the ACT scholastic achievement test, our high school graduates average score is 18.1, which ranks us 4th. Kentucky’s ratio of pupil-teacher is 19.2, which ranks us 7th in this region” (197).

¹⁴¹ *id.* at 205, quoting 3 Debates Constitutional Convention 1890 at 4459 (remarks of Delegate Beckner). In fact, the “history” section of this opinion consists almost exclusively of Beckner’s statements. Beckner, in the course of discussing the state’s obligation to provide education to all of its citizens, laid out four “justifications for and characteristics of” the public schools (the most interesting of which being that “education should be given to all—rich and poor—so that our people will be homogeneous in their feelings and desires”). Stephens would use these as a model for his own rubric, mentioned both *supra* and *infra*, for what constituted an adequate education in Kentucky. Although this is once again “anachronistic” from a historical standpoint—who *knows* what Beckner intended, as far as school finance litigation goes?—it is nonetheless a fascinating attempt to create what Cass Sunstein has labeled a “useable past.” See “The Idea of a Useable Past,” 95 *Columbia Law Review* 601, 605 (1995): “The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture’s repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future.” Insofar as state supreme courts that have read the remarks of their constitutional “framers” as leading to outcomes favoring plaintiffs in this sort of litigation, they are engaged in the latter activity—that of creating a “stylized” past “leading to a desired future”—rather than simply “reimagining the past.” This is a crucial distinction, although, as I argue in the conclusion to the previous chapter, it is not even necessary to do that to reach a result in a given case. What must be avoided in Sunstein’s opinion (and also in mine) is “reading history at a very high level of abstraction...and [then] concluding that some concrete outcome follows for us.”

decision and “the West Virginia Supreme Court’s¹⁴² (*sic*)...definition of “thorough and efficient” because “we consider foreign cases, along with our constitutional debates, Kentucky precedents and the opinion of experts in formulating the definition of efficient’ as it appears in our Constitution.”¹⁴³ Finally, Stephens quoted Kern Alexander’s definition of “efficient” as applied to a modern-day school system:

Dr. Kern Alexander opined that an efficient system is one which is unitary. It is one in which there is uniformity throughout the state. It is one in which equality is a hallmark and one in which students must be given equal educational opportunities, regardless of economic status, or place of residence. He also testified that ‘efficient’ involves pay and training of teachers, school buildings, other teaching staff, materials, and adequacy of all educational resources. Moreover, he, like Dr. Salmon, believed that “efficient” also applies to the quality of management of schools. Summarizing Dr. Alexander’s opinion, an efficient system is unitary, uniform, adequate and properly managed.¹⁴⁴

From all of this, Stephens formulated eight “characteristics” of a system of common schools and seven “capacities” they must develop in students.¹⁴⁵ When applied to the system of school

¹⁴² It is the “Supreme Court of Appeals of West Virginia,” although this unwieldy title is rarely written out in its entirety.

¹⁴³ *id.* at 210.

¹⁴⁴ *id.* at 211.

¹⁴⁵ The “characteristics” were as follows: “(1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly. 2) Common schools shall be free to all. 3) Common schools shall be available to all Kentucky children. 4) Common schools shall be substantially uniform throughout the state. 5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances. 6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence. 7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education. 8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.” As for the “capacities” of the individual students: “(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market” *id.* at 213. Although these were not in any sense “quantifiable,” they amounted to the most detailed judicial explanation as to *what* the public schools were supposed to do yet articulated by a state supreme court. It is largely for this reason that *Rose* is often compared with *Brown*. In the sense that both of these cases were supported by much text that meant very little, this is indeed an accurate comparison.

9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

finance then existing in Kentucky, Stephens and the other justices in the majority were left to conclude that it failed to provide a “thorough and efficient” education. The Kentucky legislature responded to the holding within a year, passing the Kentucky Education Reform Act (“KERA”), a document that had been shaped by many of the people involved with the two education reform organizations that had been parties to the *Rose* litigation. The passage of KERA did not end the struggle over school finance in Kentucky, but it improved the system of public education funding to the point that the state was able to withstand a subsequent lawsuit brought by the Council for Better Education—one of the two advocacy groups involved in *Rose*—in 2003.¹⁴⁶

This seems, at least superficially, like a tremendously “activist” decision, and it was interpreted as such by many legal scholars.¹⁴⁷ But Michael Paris, in his monograph-length study of *Rose*, has argued compellingly that it was in fact a rather “restrained” holding: “It propped up the legislature in its fight with the governor; it offered up a broad and inspiring rhetorical argument that called on others to seize the moment and make history; and it issued a ‘nonremedy’ that left it up to others [many of whom had been intimately involved in the litigation] to do the legislating.”¹⁴⁸ Throughout the course of the *Rose* lawsuit, its backers had reassured the public that they were not interested in a “Robin-Hood” resolution to the issue; in other words, although Justice Stephens made a show of discussing “equality” in his opinion, this case would not result in “equalization” of resources.¹⁴⁹

¹⁴⁶ Paris at 210. The legislature approved a significant increase in education spending in 2006, and the lawsuit—which had been pending since 2003—was dismissed by a trial court in 2007. The Council for Better Education, satisfied by the legislative result, did not appeal the dismissal.

¹⁴⁷ As in the articles cited in n. 122 and n. 124, among many others.

¹⁴⁸ Paris at 192.

¹⁴⁹ Members of the Council for Better Education, one of the advocacy groups involved in the litigation, went out of their way to tell the public that they were “anti-Robin Hood...advocat[ing] an infusion of funds and leveling up...[with] no desire to take resources away from any district” (Paris, 173).

Meanwhile, in *Edgewood School District v. Kirby* (1989), the Texas Supreme Court sought to provide closure to the state school funding saga that had begun, nearly two decades earlier, with the line of *Rodriguez* decisions.¹⁵⁰ The gap in funding among districts had widened in the ensuing years; spending per student ranged from \$2,000 in the poorest districts to nearly \$20,000 in the richest.¹⁵¹ Writing for the majority, Justice Oscar Mauzy authored an opinion in which these funding disparities were found to violate several state constitutional provisions: the equal rights guarantee of Article I, Section 3; the due course of law guarantee of Article I, Section 19; and the “efficient system of public schools” clause of Article VII, Section 1.¹⁵² To buttress his holding, Mauzy provided an interpretation of the comments of delegates at the 1875 Texas Constitutional Convention as well as a handful of dictionary definitions of the term “efficiency.” Relying on remarks such as “I boldly assert that it is for the general welfare of all, rich and poor, male and female, that the means of a common school education should, if possible, be placed within the reach of every child in the State” and an 1864 Webster’s entry of “efficiency” that read “causing effects; producing results; actively operative; not inactive, slack or incapable; characterized by energetic and useful activity,” Mauzy concluded that “in mandating ‘efficiency,’ the constitutional framers and ratifiers did not intend a system with such vast disparities as now exist” but instead “stated clearly that the purpose of an efficient system was to provide for a ‘general diffusion of knowledge.’”¹⁵³ All of this, coupled with a general statement from a prior case in which the Texas Supreme Court stated that it had the power to review legislative enactments, gave the court the authority to review the system of school finance

¹⁵⁰ *Edgewood v. Kirby* 777 S.W.2d 391 (Texas 1989).

¹⁵¹ *id.* at 391.

¹⁵² *id.* at 392.

¹⁵³ *id.* at 398, quoting Noah Webster, *An American Dictionary of the English Language* (1864), p. 430 and S. McKay, *Debates in the Texas Constitutional Convention of 1875* (1930) at 198.

at issue in *Edgewood*. While slightly anachronistic in the strictest sense, it comports with what other many reformist courts had done with regard to issues of the “framer’s intent”: they fashioned, from various statements, a sort of “useable past” that justified their decision in the present.¹⁵⁴

What Mauzy and the others in the majority did not fashion, however, was a suitable or even an especially clear remedy to the constitutional violation they had announced. Unlike in *Rose*, where the court had offered a handful of hortatory and remarkable quotes about public education and then left the matter in the hands of a state legislature already in the process of crafting an education reform bill, *Edgewood* was a tremendously unclear holding. First, the court failed to give *any* instructions to the legislature: were students to be made more equal, or taxpayers? In the end, Mauzy offered the following advice: “There must be a direct and close correlation between a district’s tax effort and the education resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.”¹⁵⁵

This seemed to indicate that the legislature should focus on tax equity, thereby bringing spending among all of the state’s school districts in line with one another. Subsequent opinions altered this focus to that of “per-pupil” equity; in the meantime, the second *Edgewood* decision, which attempted to clarify the holding in the first, suggested that a “Robin Hood” tax program

¹⁵⁴ See n. 139, *supra*. Cass Sunstein, “The Idea of a Useable Past,” 95 *Columbia Law Review* 601, 605 (1995): “The historian is trying to reimagine the past, necessarily from a present-day standpoint, but subject to the discipline provided by sources and by the interpretive conventions in the relevant communities of historians. By contrast, the constitutional lawyer is trying to contribute to the legal culture’s repertoire of arguments and political/legal narratives that place a (stylized) past and present into a trajectory leading to a desired future.” As I have mentioned repeatedly, this is the *only* way that they could be invoking this history, since the intent of the framers—as clearly indicated by the body of discursive materials (their own remarks at the conventions, court opinions from the 19th century, etc.) in which they are embedded—is obviously *contra*. But it is not the only way they could have proceeded, nor was it the most helpful way; they could also have stated that they were simply acting *in the spirit of* these individuals by continuing to expand access to public education.

¹⁵⁵ *id.* at 397.

(so termed by its later opponents) setting minimum property tax rates across the state coupled with the consolidation of school districts would pass constitutional muster.¹⁵⁶ That second holding enraged some legislators and created some momentum among conservative Republicans to vote all nine justices out of office in the next judicial election.¹⁵⁷ Although this failed to happen—unseating incumbent judges is a difficult matter indeed¹⁵⁸—the fallout from *Edgewood* prompted Democratic Governor Ann Richards to stake her political fortunes to a proposed constitutional amendment that would have forced richer school districts to share some of their revenue with poorer neighboring districts.¹⁵⁹ Owing partly to voter apathy and partly to an “anti-tax crusade” against the plan, the amendment was defeated by a 2-to-1 margin.¹⁶⁰ Nevertheless, a modified version of this program—another sort of “Robin Hood” scheme, although the precise parameters varied slightly—was enacted by the legislature in 1994 and met with tentative judicial approval. It never quite satisfied the public—two policy analysts remarked as it was

¹⁵⁶ *Edgewood Independent School Dist. v. Kirby*, 804 S.W. 2d 491 (1991).

¹⁵⁷ As described in Reed, *On Equal Terms*, pp. 72-73.

¹⁵⁸ For more on this subject, see Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (Routledge, 2009).

¹⁵⁹ Amended over 326 times and checking in at nearly 30,000 words, the Texas Constitution is a remarkably long and convoluted document. Voters in the state find themselves asked to decide on a constitutional amendment in nearly every single election, some of which are three paragraphs (or more) in length. To put all of this in perspective: the average state constitution is around 19,000 words (and has been amended 110 times, on average 1.25 times per year); this chapter is close to 12,000 words; and the federal constitution runs approximately 4,300 words. See Robert F. Williams, “Amending and Revising State Constitutions” in *The Law of American State Constitutions* (Oxford, 2009), pp. 359-399.

¹⁶⁰ Sam Howe Verhovek, “Texans Reject Sharing School Wealth,” in *The New York Times* (05-03-1993). Richards would herself go down in defeat in 1994, a victim of George W. Bush’s astute campaigning as well as the rising tide of grassroots right-wing support that propelled the Republicans to considerable success during that election season. The defeat likely not due to this: however well-organized the “anti-tax crusade” which Verhovek discussed, only 25% of the state’s eligible voters cast a ballot on the issue of the school amendment. Verhovek highlights the generally apathetic response by noting that “nearly three times as many Texans lined up for a shot at the \$50 million state lottery on Saturday as the more than 2.04 million who turned out at the polls.” This measure did not generate the sort of turnout that Proposition 13 had, but perhaps that was because that issue was framed in the other direction; i.e., the capping of tax rates, rather than—as here—what seemed to amount to the diminution of local control of the schools. For the most part, these pro-education constitutional amendment measures have rarely received, although the partial success of one such measure in Florida will be discussed later in this chapter.

being implemented that “a taxpayer revolt is a real threat”¹⁶¹—and ten year later it was held to be an unconstitutional “statewide property tax” by a very different Texas Supreme Court.¹⁶²

3.3.2 Victories, Defeats, and New Constitutional Language

Both from a rhetorical as well as a practical standpoint, the most notable victories for school reformers in the 1990s occurred in the Northeast. Supreme Courts in Massachusetts, New York, and Vermont all held their systems of school financing to be unconstitutional, each doing so in declarative prose that provided a clear mandate to its state legislature.¹⁶³ All three courts are also relatively insulated from voters, with only the Vermont justices facing so much as a retention election—a fact remarked upon by participants in all three cases as crucial to their outcome, even as social science research on the subject has indicated that a state’s method of judicial selection seems to have little impact on the results of school funding litigation.¹⁶⁴

¹⁶¹ William Hobby and Mark Yudof, “Texas Got Itself into This School-Finance Mess, How’s It Going to Get Out?” in *Houston Chronicle* (12-15-1991).

¹⁶² It was held to be constitutional in *Edgewood Independent School Dist. v. Meno*, 917 S.W.2d 717 (1995), then declared unconstitutional in *Neeley v. West Orange-Cove Consol. Independent School District*, 176 S.W.3d 746 (2005). In the latter opinion, Justice Scott Brister, a staunch Republican and Rick Perry appointee, decided to use his impassioned concurrence/dissent to write some *new* history, attempting to modify the meaning of “efficiency” established by Justice Mauzy in the first *Edgewood* decision: “Perhaps this [definition] made sense in 1989—before the Berlin Wall fell, before the Soviet Union collapsed, and before state-run businesses everywhere proved uncompetitive. Perhaps back then a government system was ‘efficient’ if it could get sufficient public funding. But surely not now. Today, we know that one thing above all else makes service providers efficient: competition. Even formerly communist countries recognize how efficiency is produced—not by protectionism, not by higher taxes, and not by state control, but by freedom for competition,” at 802.

¹⁶³ *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (Massachusetts 1993); *Campaign for Fiscal Equity v. State of New York*, 86 New York 2d 307 (1995); *Brigham v. State*, 692 A.2d 384 (Vermont 1997).

¹⁶⁴ See Karen Swenson, “School Finance Reform Litigation: Why are Some State Supreme Courts Activist and Others Restrained?” 63 *Albany Law Review* 1147, 1167 (1999): “These results do not appear to vary with the method of selecting justices, contrary to Hypothesis 8A (Elective courts are more likely than appointive courts to strike down school finance schemes in states with liberal mass publics; elective courts are more likely than appointive courts to uphold school finance schemes in states with conservative mass publics). This is not surprising, in light of the impact of retention elections amongst appointive supreme courts. Indeed, the consistent relationship between decision-making and public opinion is heartening to those who dislike activist courts that appear to make decisions based on no more than their members’ own policy preferences.” Paula J. Lundberg, “State Courts and School Funding: A Fifty-State Analysis,” 63 *Albany Law Review* 1101, 1137-1138 (1999) is also instructive:

In *McDuffy v. Secretary of Education*, the Massachusetts Supreme Judicial Court (“SJC”), in the course of deciding a school finance lawsuit brought on behalf of sixteen students enrolled in schools throughout the state, revisited the education clause in its constitution discussed in the previous chapter.¹⁶⁵ Massachusetts Chief Justice Lemuel Shaw, in deciding the case of *Roberts v. Boston* in 1849, had concluded that municipalities had plenary power to organize their school districts as they saw fit.¹⁶⁶ The lofty exhortation to the legislature “to cherish...the public schools” that John Adams had penned was, by the author’s own admission, much empty rhetoric. But for Chief Justice Paul Liacos, who had been appointed to the SJC in 1976 by Governor Michael Dukakis, this interpretation of what was now Part II, Chapter 5, Section 6 of the Massachusetts Constitution no longer suited the times: “The content of the duty to educate which the Constitution places on the Commonwealth necessarily will evolve together with our society...and [o]ur Constitution, and its education clause, must be interpreted in accordance with the demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning.”¹⁶⁷

This statement followed a lengthy attempt by Justice Liacos to fashion a “useable past” out of the same history that, read carefully in search of the “original intent” of the figures involved, would appear to militate against a favorable result for the plaintiffs. After an extensive

“Neither length of term nor method of attaining office are significantly associated with case outcomes.... Neither controlling for the partisanship of the traditionalistic states nor interacting state liberalism scores with court partisanship produces a significant result. The lack of significance of court partisanship (COURT), either as a direct or indirect effect on the judicial decision in school funding cases, sets these kinds of cases apart from those examined by other researchers, such as abortion and death penalty cases, where partisanship was found to be a significant contributor to case outcomes. *An explanation for this might be that school funding does not have the same partisan salience with the public as does the either/or aspect of the controversies regarding abortion and the death penalty that are the subjects of prior research*” (emphasis added). Nevertheless, the jurists discussed in this section seem to believe, at least as regards their experiences, that this made a great deal of difference in how they decided and reacted to the cases.

¹⁶⁵ *McDuffy v. Secretary of Education*, 615 N.E.2d 516 (Massachusetts 1993).

¹⁶⁶ *Roberts v. Boston*, 59 Massachusetts 198 (1849).

¹⁶⁷ *McDuffy* at 554.

survey of educational developments in Massachusetts, Liacos concluded that all of this material, from the statements of John Hancock and Samuel Adams to the (seemingly contrary) holding in *Commonwealth v. Dedham* (1819), demonstrated incontrovertibly the “fundamental relation between republican government and public education, and the constitutional duty imposed by Part II, C. 5, § 2, to provide for the education of the people.”¹⁶⁸ From this, he stated that “the reality is that children in the less affluent communities (or in the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.”¹⁶⁹ As to what that opportunity was, he quoted the guidelines presented in the *Rose* decision and then left it to “the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future.”¹⁷⁰

McDuffy was re-litigated on several occasions, and the Supreme Judicial Court maintained jurisdiction of the case for the fifteen years. During this period, and for reasons that have been disputed by social scientists, Massachusetts’ public schools have outpaced the performance of schools in every other state, and now constitute the only state school system competitive at the world level.¹⁷¹ Justice John Greaney, who was in the *McDuffy* majority, had his own explanation for why the litigation went so smoothly:

¹⁶⁸ *Commonwealth v. Dedham*, 16 Massachusetts 141 (1819). This case, described in detail in the previous chapter, seemed to specify only *intradistrict* equality for pupils so situated: “Common schools should be maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges, for the education of their children in the public schools.” *Roberts* further limited this holding, noting that the mandate, such as it was, needed to be interpreted in such a way as to give the municipal government as much discretion to organize its schools as possible. Liacos’ interpretation of the *spirit* of all this material, however, is entirely consistent with how other jurists involved in this litigation have “used” history to justify their claims.

¹⁶⁹ *McDuffy* at 552.

¹⁷⁰ *id.* at 556.

¹⁷¹ See Amanda Ripley, “Your Child Left Behind,” in *The Atlantic*, December 2010. Accessed at <http://www.theatlantic.com/magazine/archive/2010/12/your-child-left-behind/8310/>. These rankings of “competitiveness” are based exclusively on test score data, and will be discussed in greater detail in the final

In Massachusetts, we are unelected judges. We serve until age seventy. So if there's any backlash, which there really wasn't over *McDuffy*, we cannot be removed. They can do certain other things, but they can't get rid of us.¹⁷²

He went on, however, to stress that what really determined the outcome in these cases were the voting choices of the justices:

[In the early 2000s], two other judges were new to the court, and, if the membership changes, even in an unelected court like ours, results can change. The [new justices] wanted the *McDuffy* decision overruled. It was their position, basically, that the education clause had been so misconstrued, and, even if it hadn't been misconstrued, the remedy was so daunting that the court should not have been involved in the first place. One of them used the word 'judicial imagination' in characterizing the decision in *McDuffy*. There were two judges...who dissented because we wanted to forge on. That's where the case is now, except that the three [voted in a way] that left a little narrow opening that might allow the case to come back—in other words, that if it comes back, that 3-2-2.¹⁷³

The case to which Justice Greaney was referring, *Hancock v. Commissioner of Educ.* (2005), offered a typical conclusion to this sort of litigation. In *Hancock*, the SJC, per new Chief Justice Margaret Marshall (a William Weld appointee), held that the state and its school districts were meeting the constitutional mandate put to them by the courts, and that, as in *McDuffy*, it was left to the governor and legislature to continue to work to improve the quality and evenness of funding throughout the state.¹⁷⁴

In New York during this same period, the Ford Foundation-backed Campaign for Fiscal Equity ("CFE") had initiated a school finance lawsuit that reached the New York Court of

chapter. Some, such as economist Eric Hanushek, attribute the strong performance of these schools to improved "teacher accountability"; others attribute it to increased and more uniform funding.

¹⁷² Transcript of "Equal Educational Opportunity" symposium at Columbia Teachers College in 2007, reprinted in the appendix to Rebell, *Courts and Kids*, p. 109. The "backlash" against the justices in these matters seems limited to spirited op-ed pieces and campaign challenges, such as the one that Ohio Justice Alice Robie Resnick faced after the *DeRolph* litigation that is discussed in the next chapter, that ultimately prove unsuccessful. See Paula J. Lundberg, quoted at n. 162: "An explanation for this might be that school funding does not have the same partisan salience with the public as does the either/or aspect of the controversies regarding abortion and the death penalty that are the subjects of prior research."

¹⁷³ *id.* at 110.

¹⁷⁴ *Hancock v. Commissioner of Education*, 443 Massachusetts 428, 462 (2005).

Appeals in 1995. The CFE had grown weary of repeated political impasses between the legislature and the executive, and pursuing a legal strategy in which it argued that the state was not providing an “adequate” education, placed the matter before the unelected judges of the Court of Appeals.¹⁷⁵ Judge Albert Rosenblatt, the only one of Governor George Pataki’s appointee who would vote with the majority in holding that New York’s method of funding its schools was unconstitutional, believed that, in doing so, he was performing a critical public function:

The courts have the obligation [to decide these matters] because the courts have no choice. When a litigation is filed, the courts must decide it, and the courts do so seriously, even if not necessarily cheerfully. In the context of the separation of powers...the judges are the ones that can be counted on ‘to do the right thing.’ The reason the legislators are not willing to ‘do the right thing’ is that the voters don’t want them to. We live in a democracy, and we always have to bear in mind that when the voters don’t want something to happen and the judges are called upon to do something, then what they are doing in a sense is antimajoritarian...[but] we want to be careful about that because judges don’t like to be seen as elitist or as activists. They don’t want to be seen as people who have jobs protected by life tenure, by appointment, that will enable them to beat the heck out of the taxpayers.¹⁷⁶

Here, the Court of Appeals, per Judge Ciparick, showed little hesitation in overruling *Levittown v. Nyquist*, an early-1980s case in which the plaintiffs had attempted to prevail by means of an “equity-based” argument.¹⁷⁷ The interpretation of the “Education Article” in New York’s constitution is fascinating: Both Ciparick and Judge Hugh R. Jones, author of the *Levittown* decision, accepted that this constitutional provision imposed an affirmative duty on the

¹⁷⁵“Campaign for Fiscal Equity History,” http://www.cfequity.org/static.php?page=our_history&category=about_us.

¹⁷⁶ Transcript in *Rebell*, p. 114.

¹⁷⁷ *Levittown v. Nyquist*, 439 N.E.2d 359 (New York 1982). The argument, summarized in the first few paragraphs of that case, was quite simple: expenditures in districts throughout the state were grossly unequal, and thus quite obviously ran afoul of the equal protection provision of New York’s constitution. The Court of Appeals refused to accept that argument, holding that “because decisions as to how public funds will be allocated among the several services for which by constitutional imperative the Legislature is required to make provision are matters peculiarly appropriate for formulation by the legislative body (reflective of and responsive as it is to the public will), we would be reluctant to override those decisions by mandating an even higher priority for education in the absence” (at 369).

legislature to provide a “sound public education.”¹⁷⁸ Where they differed was in deciding whether the state was fulfilling this duty. Ciparick, after dismissing an argument based on the state constitution’s equal protection clause¹⁷⁹ and noting that a *prima facie* Title VI violation had been alleged but needed to be reinstated at the trial court so it could be litigated on its merits, concluded that, under the terms of the education article, the plaintiffs had indeed presented a sufficient case that many New York students were not receiving a “sufficient” education.¹⁸⁰ The case was thereafter remanded to the trial court for a decision on the merits, thus ending the struggle over the viability of school finance litigation in New York—such complaints were now actionable under the education clause in the constitution—but by no means terminating the lengthy, contentious dialogue among the three branches of state government over this issue.¹⁸¹

In a 1997 *per curiam* opinion, the Vermont Supreme Court went further than even the courts in New York and Massachusetts had, at least rhetorically speaking, by interpreting its state constitution to provide all citizens with a fundamental right to education.¹⁸² In reaching this result, their effort to create a “useable past” for the state was put squarely on the issue of *access*. What mattered for them was not how the education clause in the state’s first constitution was meant to be interpreted, but rather the fact that it was there at all:

¹⁷⁸ *Campaign for Fiscal Equity v. State of New York*, 86 New York 2d 307, 315 (1995). Only in the dissents to these cases did any judge advance the notion that the provision was merely hortatory in nature; Ciparick dismissed this claim in *Campaign for Fiscal Equity* with a simple statement that “contrary to the dissenting expression of Judge Simons, we are unable to adopt the view that the constitutional language at issue is, in effect, hortatory.”

¹⁷⁹ See n. 175. On this ground, he agreed with the majority in *Levittown*.

¹⁸⁰ *id.* at 319.

¹⁸¹ See Neil deMause and Elizabeth Green, “The Campaign for Fiscal Equity Lawsuit Was the Best Hope for City Schools. It Failed,” in *The Village Voice*, 01-21-2009. After the Court of Appeals ordered the state and city to spend an additional \$5.6 billion on NYC schools in 2004, changed economic circumstances and massive budget shortfalls made the implementation of that mandate impossible. Two years earlier, Judge Rosenblatt had remarked, “Ultimately, there must be a political resolution with the judges in the role of pointing [the other branches] in the right direction. Judges do not have budgets to make allocations. Judges don’t cut checks.” Rebell at 121. In this unfortunate instance, no checks could be cut at all, since they would have “bounced.”

¹⁸² *Brigham v. State*, 692 A.2d 384 (1997).

The important point is not simply that public education was mentioned in the first Constitution. It is, rather, that education was the *only* governmental service considered worthy of constitutional status. The framers were not unaware of other public needs. Among the first statutes enacted by the General Assembly in 1779 were two separate acts for the maintenance and support of the poor and infirm...The other statute, entitled “An Act for Maintaining and Supporting the Poor,” required towns to ‘take care of, support, and maintain their own poor,’ *id.* at 97, giving rise to what has euphemistically been called ‘poor farms.’ Despite the obvious public concern for those least able to care for themselves, the framers made no provision in the Constitution for public welfare or ‘poor relief’ as it was then known. Indeed, many essential governmental services such as welfare, police and fire protection, transportation, and sanitation receive no mention whatsoever in our Constitution. Only one governmental service—public education—has ever been accorded constitutional status in Vermont.¹⁸³

This claim was then supplemented, as is characteristic of nearly all of these opinions, with a grab-bag of lofty statements about education made by various framers, founders, and other important figures from the distant past—but it need not have been, for their earlier, simpler statement would have sufficed (as, to be certain, would a simple majority vote,¹⁸⁴ coupled with a short explanation of some sort about what the majority had decided).¹⁸⁵ From there, the court went on to explain that the system need provide only “substantial equality” rather than “true equality” of funding, yet at the moment was offering neither. It then left the matter of achieving “substantial equality” to the legislature, stating that “the specific means of discharging this broadly defined duty is properly left to its discretion.”¹⁸⁶

However, in three of the states with the largest education budgets—Illinois, Pennsylvania, and Florida—plaintiffs’ lawsuits based on both “equity” and “adequacy” grounds

¹⁸³ *id.* at 391.

¹⁸⁴ See Greaney’s statement at n. 171 regarding the significance of the “vote” in constitutional adjudication. This will become even more apparent with the discussion of the *DeRolph* case in the next chapter, given how much shifting lineups of justices impacted that litigation.

¹⁸⁵ e.g., “From the earliest period in this State, the proper education of all the children of its inhabitants has been regarded as a matter of vital interest to the State, a duty which devolved upon its government....The constitution of the State especially enjoins upon the legislature the duty of passing laws to carry out this object... [T]he whole subject of the maintenance and support of common schools has ever been regarded in this State as one not only of public usefulness, but of public necessity, and one which the State in its sovereign character was bound to sustain” (at 394). None of this language, such as it is, creates a single enforceable right—but the holding in *Brigham* does.

¹⁸⁶ *id.* at 398.

met with defeat. The Illinois Supreme Court, in fact, explicitly rejected each theory in separate cases. In *Committee for Educational Rights v. Edgar* (1996), the majority, per Justice John Nickels, interpreted Article X, Section 1 of the Illinois Constitution to create no legally enforceable rights.¹⁸⁷ Nickels, in reaching this conclusion, was able to reflect on the work of the relatively recent 1970 Illinois Constitutional Convention, where delegates “embraced this limited construction that the constitutional efficiency requirement authorized judicial review of school district boundaries, but they did not intend to otherwise limit legislative discretion.”¹⁸⁸ Here was, as in Montana with the *Helena Elementary School* case, an instance where the “framers’ intent” had been precisely articulated in a contemporary context, immediately after school finance lawsuits had commenced in various states. But again: how much deference was due to these statements, given their non-binding nature? For Justice Nickels and the majority, such information was dispositive: “We conclude that the question of whether the educational institutions and services in Illinois are “high quality” is outside the sphere of the judicial function...[and] to the extent plaintiffs’ claim that the system for financing public schools is unconstitutional rests on perceived deficiencies in the quality of education in public schools, the claim was properly dismissed.”¹⁸⁹ Three years later, in *Lewis E. v. Spagnolo*, a lawsuit brought

¹⁸⁷ *Committee for Educational Rights v. Edgar*, 174 Illinois 2d 1 (1996). That section of the Illinois Constitution reads as follows: “A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.”

¹⁸⁸ *id.* at 16. The commentary on this provision also supports Nickels’ contention. See ILCS Ann., 1970 Const., art. X, § 1, Constitutional Commentary, at 789: “There is no indication that the Convention intended to alter the line of cases in which the courts have deferred to the legislature on the meaning of terms such as ‘efficient.’” Delegate Dawn Clark Netsch, after proposing some of the language the wound up in the final article, noted that “[t]he State has the primary responsibility for financing the system of public education” and that this provision was “hortatory...[creating] no legally enforceable duty.” It would merely “function as a conscience to the General Assembly to assume a greater proportion of the financing of public schools of the state.” 5 Illinois Convention of 1969-1970 at 4145, 4502.

¹⁸⁹ *id.* at 32.

on “adequacy” grounds was rejected with little discussion, and for precisely the same reason: “We now reaffirm our recent holding in *Committee for Educational Rights v. Edgar* (1996), that questions relating to the quality of a public school education are for the legislature, not the courts, to decide.”¹⁹⁰

Meanwhile, Pennsylvania—which, like West Virginia, had adopted the “thorough and efficient” language added to the Ohio Constitution in 1851—continued to interpret this provision differently than those states did. In the 1979 case *Danson v. Casey*, decided contemporaneously with *Pauley* in West Virginia, the Pennsylvania Supreme Court held that school finance decisions were non-justiciable “political questions” to be resolved by the state legislature.¹⁹¹ As the so-called “third wave” of adequacy-based litigation crested in the 1990s, the court affirmed, without comment, two decisions of its intermediate appellate courts. First, in *Marrero v. Commonwealth*, the Commonwealth Court decided against a suit brought by several Philadelphia students and the NAACP based on an “equity” argument that would, if accepted, have required significant revenue equalization throughout the Pennsylvania school system. The court, in rejecting the plaintiffs’ argument, pointed to the well-established interpretation of Article 3, Section 14 of the Pennsylvania Constitution—viz., that it “conferred no particular right upon each student to a particular level or quality of education.”¹⁹² The Commonwealth Court relied heavily on *Danson*’s determination of the intent of the delegates at the state’s 1873 constitutional convention, where the education article had been drafted: “In originally adopting the ‘thorough and efficient’ amendment to the Pennsylvania Constitution of 1873, the framers considered and rejected the possibility of specifically requiring the Commonwealth’s system of education be

¹⁹⁰ *Lewis E. v. Spagnolo*, 186 Illinois 2d 198 (1999).

¹⁹¹ *Danson v. Casey*, 399 A.2d 360 (Pennsylvania 1979). See also n. 92, *supra*.

¹⁹² *Marrero v. Commonwealth*, 709 A.2d 956, 962 (1998).

uniform.”¹⁹³ In the companion case of *Pennsylvania Association of Rural and Small Schools v. Ridge*, the Pennsylvania Supreme Court affirmed the Commonwealth Court’s determination that an “adequacy” argument was unacceptable, and for precisely the same reasons.¹⁹⁴ Here, then, was a necessary reaffirmation: the “history” of these clauses, at least as concerned the resolution of school finance litigation cases, would always intersect with the policy preferences of the judges involved, and so would always be determined by a majority vote.

In Florida, however, something rather different occurred at the close of the 1990s: the very language of the state’s education clause was changed by a majority vote of the general electorate. This alteration occurred after the Supreme Court of Florida handed down its decision in *Coalition for Adequacy and Fairness in School Funding v. Chiles*, a *per curiam* opinion where the court rejected an “adequacy”-based lawsuit in part because the plaintiffs had failed to present any clear guidelines for determining “adequacy” and in part because the court did not wish to intrude on matters which it believed were left to the discretion of the legislature.¹⁹⁵ This decision was based on the court’s interpretation of Article IX, Section 1 of the Florida Constitution, which at the time read as follows: “Adequate provision shall be made by law for a

¹⁹³ *id.* at 961.

¹⁹⁴ *Pennsylvania Association of Rural and Small Schools v. Ridge*, 737 A.2d 246 (1999). In the petitioner’s brief, the attorneys for the Pennsylvania Association of Rural and Small Schools had presented an argument regarding the “framers’ intent” that was quite similar to the reasoning presented by courts that had held for plaintiffs in these cases: “Public education in Pennsylvania has roots in several traditions. First, there is the commitment of William Penn and the early frames of government to public education and, in particular, the provision of free education for children whose parents were unable to pay for their schooling. In addition, there was the tradition of public education brought to the Commonwealth by German immigrants. Early in the Nineteenth Century, the ‘common school’ movement developed in Pennsylvania, as elsewhere. This movement was committed to the provision of free elementary schooling for every child, with increasing state control and state financial support for local schools. These developments culminated in the adoption of the Education Clause of the 1874 Constitution, which provided: ‘The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.’ The drafters of the 1874 Constitution specifically intended that poor and wealthy districts alike should have a substantially equal ability to provide quality education to their students. Petitioner’s Brief at 3.

¹⁹⁵ *Coalition for Adequacy and Fairness in School Funding v. Chiles*, 680 So.2d 400, 401 (1996).

uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require.”¹⁹⁶ The court concluded that the word “adequacy” could not be properly defined either by historical analysis—of which it engaged in very little, relative to other opinions of this sort—much less by the current members of the court, who were not well-positioned to constantly reevaluate legislative decisions regarding school funding.¹⁹⁷

In response to this decision, Florida legislators began a reexamination of the education article in the state’s constitution.¹⁹⁸ The process of deciding upon new language was a contentious one, with some interested parties wanting Florida to return to the wording of its 1868 constitution (“Education is the paramount duty of the state...”) and others seeking to add specific individual rights to the wording.¹⁹⁹ The language finally presented to the voters in November 1998 seemed to indicate that it would be, using the framework established and followed by many legal scholars, a “strong” education clause. Certainly it would not be a merely “hortatory” one:

¹⁹⁶ Florida Constitution, Article IX, Section 1 (superseded). *id.* at 406. The addition of this language to the Florida Constitution, which itself superseded a provision which stated that it was the “paramount duty” of the state to educate all of its children, is discussed in the section on Reconstruction-era constitutional framing in the previous chapter.

¹⁹⁷ *id.* at 407.

¹⁹⁸ Daniel Gordon, “Failing the State Constitutional Education Grade: Constitutional Revision Weakening Children and Human Rights,” 29 *Stetson Law Review* 271, 284-286 (1999). Although the language of the state’s new education article had been hailed by reformers such as Michael Rebell and even recently discussed at a recent panel on new model language for the Pennsylvania constitution, Gordon correctly (and presciently, given the date that this article was published) assessed its effectiveness: “For educational reformers in Florida in the 1990s, no state constitutional route seemed to work. Litigation strengthened the power of the Legislature that was often the target of complaints in litigation. Constitutional revision through the ballot initiative process faltered because the initiative proposal impacted the Legislature too broadly. In addition, the creation of a strong fundamental right to a public education and an explicit, strong definition of an adequate provision for public education was weakened by the Florida Constitution Revision Commission. Overall, the state constitutional basis for the provision of a public education was lessened. The Florida Constitution Revision Commission missed the opportunity to release the Florida courts from the power limitation that the courts imposed on themselves in *Coalition for Adequacy*. The commission also missed the opportunity to free education reformers and Florida’s school children from the restrictiveness of the Florida constitutional initiative revision process. Finally, the Florida Constitution Revision Commission missed the opportunity to empower the Florida Constitution as a source of human rights protection for individuals by barring them from utilizing the most effective means of protecting human rights, bringing claims based on individual injuries,” at 302.

¹⁹⁹ *id.* at 286, 301-302.

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.²⁰⁰

This ballot measure, unlike the one that took place several years later in Alabama, passed with relative ease.²⁰¹ It was not opposed in any substantive way by an organized anti-tax coalition, for reasons that would become clear as the clause came to be interpreted by the state's courts. First, in *Bush v. Holmes* (2006), a decision on the issue of school vouchers, the court offered an explanation of how this new clause differed from the previous one. The court stated that the new clause had the effect of making education a “fundamental value” of the state, then cited the commentary of the Constitutional Revision Committee in further clarifying what this meant: “Early proposals presented before the Constitution Revision Commission framed education in terms of being a ‘fundamental right.’ In response to concerns of commissioners that the state might become liable for every individual's dissatisfaction with the education system, the term ‘fundamental value’ was substituted.”²⁰² It has had little effect on school finance litigation, much as its framers at the time had assured voters that it would not. In several cases during the late 2000s, plaintiffs advancing every manner of school finance argument (including a new “inadequacy of outputs” argument) have been unable to reach the Supreme Court of Florida for a hearing on the merits of their cases. The only notable decision, a ruling at the Circuit Court level in the case of *Schroeder et al. v. Palm Beach Co. School Bd. et al.* (2009), merely reaffirmed the holding in *Coalition for Adequacy*. This so-called “model” revision, then, has seemed to capture

²⁰⁰ *id.*

²⁰¹ *id.* at 300. The Alabama reform measure was defeated largely because interested voters had no assurances that it would *not* result in successful education finance litigation.

²⁰² *Bush v. Holmes*, 919 So.2d 392 (Florida 2006). See also Gordon's concerns, 298-302.

American attitudes toward education in microcosm: it appears to say a great deal, has cost very little, and has, thus far, had no practical ramifications whatsoever.

3.3.3 Variation on a Theme: *Sheff v. O'Neill*

What arrests one's attention in the wake of the *Rodriguez* and *Milliken* decisions is how little effort was made to fashion arguments that explicitly linked race and class.²⁰³ Decisions such as *Sweatt* and *Brown*, and the arguments advanced by plaintiffs to win them, appeared to offer a framework for doing so. But, as Derrick Bell has explained, these decisions were the product of a "convergence of interest" among involved parties—an uneasy Cold War consensus that, arguably, no longer obtained in the United States after the late 1960s.²⁰⁴ Thus, the school finance litigation of the past three decades—whether rooted in claims of "equity," "adequacy," or an argument for affording "strict scrutiny" to matters impinging on the "fundamental right" to education—has, if not necessarily tiptoed around issues of race and class, at least been framed in a way to suggest that the latter category is, for purposes of constitutional adjudication, independent of the former. This was, of course, not always *entirely* the case; e.g., the plaintiffs in *Campaign for Fiscal Equity v. State of New York* advanced a Title VI claim as well as a claim under the state constitution, and *Marrero* was litigated on "equity" grounds by the Pennsylvania chapter of the NAACP. Yet it is fascinating to note how far the arguments of John Coons and William Clune have taken the struggle over school funding from its early 20th century origins; after all, as polemicists such as Jonathan Kozol have argued in impassioned prose, it is still the

²⁰³ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (holding that students cannot be assigned to public schools *solely* for the purpose of achieving racial integration), which is discussed in the final chapter, further served to weaken this nexus.

²⁰⁴ Derrick A. Bell, Jr. "Brown v. Board of Education and the Interest-Convergence Dilemma." 93 *Harvard Law Review* 518, 525-526 (1980).

case that a strong and obviously invidious relationship between race and education spending exists in many school districts throughout the country.

That is why I end this chapter with an examination of the Connecticut Supreme Court's decision in *Sheff v. O'Neill* (1996).²⁰⁵ In *Sheff*, eighteen plaintiffs, represented by a coalition of New York attorneys, had filed suit against the state of Connecticut alleging a denial of their fundamental right to education under the state's constitution. The argument they made was two-pronged: first, that they were denied their right to an equal educational opportunity because their schools, located in inner-city Hartford, were severely under-funded and under-staffed; and second, that this "socioeconomic deprivation" were directly connected with the "racial and ethnic segregation" imposed on them by a 1909 Connecticut statute that, while not mandating *de jure* segregation, had established school district boundaries that resulted in the permanent and near-complete separation of one set of ethnic and racial groups from another.²⁰⁶

²⁰⁵ *Sheff v. O'Neill*, 238 Connecticut 1 (1996).

²⁰⁶ *id.* at 10. The majority opinion devotes a considerable amount of time establishing the link between racial segregation and socioeconomic deprivation: "The stipulation of the parties and the trial court's findings establish the following relevant facts. Statewide, in the 1991-92 school year, children from minority groups constituted 25.7 percent of the public school population. In the Hartford public school system in that same period, 92.4 percent of the students were members of minority groups, including predominantly students who were either African-American or Latino. Fourteen of Hartford's twenty-five elementary schools had a white student enrollment of less than 2 percent. The Hartford public school system currently enrolls the highest percentage of minority students in the state. In the future, if current conditions continue, the percentage of minority students in the Hartford public school system is likely to increase rather than decrease. Since 1980, the percentage of African-Americans in the Hartford student population has decreased, while the percentage of Latinos has increased. Although enrollment of African-American students in the twenty-one surrounding suburban towns has increased by more than 60 percent from 1980 to 1992, only seven of these school districts had a minority student enrollment in excess of 10 percent in 1992. Because of the negative consequences of racial and ethnic isolation, a more integrated public school system would likely be beneficial to all schoolchildren. A majority of the children who constitute the public school population in Hartford come from homes that are economically disadvantaged, that are headed by a single parent and in which a language other than English is spoken. The percentage of Hartford schoolchildren at the elementary level who return to the same school that they attended the previous year is the lowest such percentage in the state. Such socioeconomic factors impair a child's orientation toward and skill in learning and adversely affect a child's performance on standardized tests. The gap in the socioeconomic status between Hartford schoolchildren and schoolchildren from the surrounding twenty-one suburban towns has been increasing. The performance of Hartford schoolchildren on standardized tests falls significantly below that of schoolchildren from the twenty-one surrounding suburban towns."

This argument had not succeeded at the trial court level—in fact, the plaintiffs’ defeat had “Governor John Rowland literally popp[ing] champagne bottles at a press conference to celebrate the state’s victory”—but the Connecticut Supreme Court, in a 4-3 vote, decided in their favor.²⁰⁷ The majority opinion, written by Chief Justice Ellen Ash Peters, acknowledged the trial court’s finding that “poverty, and not race or ethnicity, is the principal causal factor in the lower educational achievement of Hartford students.”²⁰⁸ However, Peters explained that, owing to the court’s earlier decision in *Horton v. Meskill*, this was a very different circumstance since “the affirmative constitutional obligation of the state to provide a substantially equal educational opportunity, which is embodied in article eighth, § 1 differs in kind from most constitutional obligations...[because] organic documents only rarely contain provisions that explicitly require the state to act rather than to refrain from acting.”²⁰⁹ Moreover, she continued, “the scope of the state’s constitutional obligation to provide a substantially equal educational opportunity is informed and amplified by the highly unusual provision in article first, § 20, that prohibits segregation not only indirectly, by forbidding discrimination, but directly, by the use of the term ‘segregation,’ providing ... ‘no person shall be denied the equal protection of the law *nor be subjected to segregation* or discrimination ... because of ... race [or] ... ancestry.’”²¹⁰ Here, then, was an innovative jurisprudential moment: Chief Justice Peters had chosen to read together two separate provisions in the Connecticut Constitution, with the clause providing for equal educational opportunity thereby *enhanced* by the explicit anti-segregation mandate found later in the document.

²⁰⁷ Reed, *On Equal Terms*, p. 169.

²⁰⁸ *Sheff* at 11.

²⁰⁹ *id.* at 26.

²¹⁰ *id.* at 27

She buttressed this conclusion with her own particular reading of the circumstances under which these provisions were added to the constitution, stating that “the history of [these articles] supports our conclusion that these constitutional provisions include protection from *de facto* segregation, at least in public schools....not only because of the contemporaneous addition, in 1965, of these two provisions to our constitution, but also the strong commitment to ending discrimination and segregation that is evident in the remarks of the delegates to the 1965 constitutional convention.”²¹¹ But this history, standing alone, was not the only appropriate grounds for decision, since “sound principles of public policy also support our conclusion that the legislature's affirmative constitutional responsibility for the education of all public schoolchildren encompasses responsibility for segregation to which the legislature has contributed, even unintentionally.”²¹²

This was an extraordinary statement, and Peters attempted to limit the impact of her remarks by noting that a suitable remedy to the *de facto* segregation in the urban Hartford districts would have to come from the General Assembly. In fact, her concluding words indicate the recognition—found to varying degrees in all of these opinions, from *Brown* to *DeRolph* in the succeeding chapter—of the court’s ability to effect immediate change: “Although further judicial intervention should be stayed...we do not wish to be misunderstood about the urgency of finding an appropriate remedy for the plight of Hartford's public schoolchildren....[and] we are confident that with energy and good will, appropriate remedies can be found and implemented in time to make a difference before another generation of children suffers the consequences of a segregated public school education.”²¹³

²¹¹ *id.* at 30.

²¹² *id.* at 36.

²¹³ *id.* at 46.

The dissent by Justice David Borden excoriated the majority opinion for its overbreadth: “The majority cannot mean that these terms do not require such an intent irrespective of the legal context...[because] that would necessarily mean that, with respect to the exercise of all civil and political rights, the state would be required to take affirmative steps to assure that these rights are not exercised by racially or ethnically concentrated groups, regardless of any state intent to segregate.”²¹⁴ Indeed, the holding presented by Peters in her colleagues in *Sheff* would prove impossible to enforce. The eighteen named plaintiffs in *Sheff* returned to court in 1998 to press for further reforms; in 1999, they abandoned the case, dissuaded by new appointments made by Governor Rowland to the Connecticut Supreme Court and determined to pursue their agenda through vigorous lobbying of the General Assembly.²¹⁵ Regardless of what *Sheff* had meant—and it is still “good law” in Connecticut, in the sense that it has not been overturned—there is no mechanism for enforcing it. It was, as Justice Borden wryly noted, “a very nice thought.”²¹⁶

3.4 CONCLUSION

What, then, is to be made of this “bramble bush” of case law? There are, of course, some practical results to be addressed, such as increases in school funding and, in certain cases, improvements in student test performance; I will return to those in the final chapter. It is also worth pointing out that these cases constitute part of a “dialogue” with other branches of government—the contours of which I hope become more apparent in the next chapter, a case study of Ohio’s short, tumultuous experience with school finance litigation. But I want to end

²¹⁴ *id.* at 99.

²¹⁵ Natasha Gural, “Lawyers, Plaintiffs in Landmark Case Will Not Appeal” in *Associated Press* (03-23-1999)

²¹⁶ *id.* at 101.

this chapter with a brief comment about two aspects of judicial decision-making: 1) what courts are able to decide; and 2) how they are able to operationalize these decisions.

In this instance, state supreme courts have stepped into the breach, and a rather sizeable breach at that, left abandoned when the federal courts had ceased attempting to engineer a remedy to the great school funding inequities of the early 20th century. These inequities were, at base, fostered by the conjunction of racial segregation and socioeconomic deprivation. When deciding the school finance lawsuits put before them, state supreme court justices have all been free to *do what they liked* in seeking to remedy these deprivations. They were able to fashion new protections for individual rights, so long as those protections were based on their state constitutions. And, in justifying such new protections, they could reason *however they pleased*: they could create a “useable past,” interpreting the 19th-century case law and remarks of delegates at 19th-century constitutional conventions to suit what they viewed as the changing needs of the present. Alternatively, they could claim that “policy reasons” impelled the decision they had reached. Or, if desirous of leaving the settled law undisturbed, they could simply represent the older viewpoint, viz., that school funding matters were left to the discretion of the legislature. In every case, however, *the deciding was easy*. As the next chapter on school reform in Ohio illustrates, the enforcement of those decisions was another matter altogether.

4.0 DEROLPH V. OHIO: A CASE STUDY IN SCHOOL FINANCE LITIGATION

Somewhere between the ostensible courtroom “successes” achieved by the education reform movement in West Virginia, Kentucky, Massachusetts, New York, and Vermont and the “failures” in Illinois, Pennsylvania, and Florida that were discussed in the preceding chapter lies the extremely complicated yet extremely representative case of school finance litigation in Ohio. What transpired in Ohio from 1991 to 2002—the constant re-litigation of unsettled points of law, the ceaseless “dialogue” among the three branches of state government, and the slow and contested but nonetheless significant increase in state funding for education—underscores all of the problems and tensions inherent in subnational constitutional adjudication of this sort. It is for this reason that I have chosen to explore in intimate detail the ramifications of the struggle for “adequate” school funding in the state dubbed by many political pundits as America’s most “representative” state.¹

In 1991, a coalition of Ohio school districts and other interested individuals began litigation in the Perry County Court of Common Pleas, seeking a determination that Ohio’s method of funding its schools violated the education clause in that state’s constitution; the series

¹ Its status as a “bellwether” of the national mood is discussed most recently in Adam Del Deo and James Stern’s documentary *...So Goes the Nation* (2006)—the title of which is a play on the older phrase “as Maine goes, so goes the nation.”

of four rulings known collectively as *DeRolph v. Ohio* was its manifestation.² On a practical level, the sum of these rulings constituted a “defeat” for advocates of school funding reform, since the court—unwilling to prolong indefinitely its review of every subsequent funding package developed by the state legislature—eventually relinquished its jurisdiction of the matter. On a rhetorical level, however, the court’s first opinion represented a massive triumph, a judicial excoriation of an inadequate school finance system that failed many of its students. Because of this disconnect between language and effect, *DeRolph* presents an intriguing opportunity for a legal historian who wishes to untangle the skein of human history that appears in the margins or between the lines of policy journal articles, newspaper editorials, and law review notes.

Like most collective or “class action” litigation aimed at constitutional reform, *DeRolph v. Ohio* has a byzantine procedural background. Here, then, is a “Cliffs Notes” summary intended to familiarize the reader with the rudiments of *DeRolph*: The case arose out of a suit filed by the Ohio Coalition for Equity & Adequacy of School Funding (“OCEASF”) in 1991 in against the State of Ohio for its failure to provide adequate funding to educate the state’s students. In 1996, the Ohio Supreme Court held that Ohio’s reliance upon local property taxes to fund schools violated Article VI, Section 2 of the Ohio Constitution. Following that decision, the Ohio Supreme Court reheard the case three times.³ The Ohio General Assembly attempted to redress this violation by directing more state funds to school districts rather than undertaking an overhaul of its method of school funding. Both in 2000 and 2001, the court held that these changes did not satisfy its order to the General Assembly to enact a constitutional school-funding

² *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997); 678 N.E.2d 886 (Ohio 1997); 728 N.E.2d 993 (Ohio 2000); 780 N.E.2d (Ohio 2002).

³ The pertinent passage of the Ohio Constitution, art. VI, § 2, reads as follows: “The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools *throughout the state*” (emphasis mine).

system. Following another rehearing in 2002, the court again held that the system was unconstitutional but terminated its jurisdiction over the case. As of 2008, Ohio's method of funding its schools remains "unconstitutional" in the strictest sense, although the state—like other states where plaintiffs prevailed in such litigation—is now allocating billions of additional dollars to its public schools.⁴

I have organized this chapter on *DeRolph* into three sections. The first section provides a brief examination of the origins of the education clause in Ohio's state constitution and the cases interpreting that clause that preceded *DeRolph*. I use the second section to examine the *DeRolph v. Ohio* rulings and evaluate the Ohio General Assembly's myriad responses. To contextualize these rulings, I discuss the reactions of the governor, legislators, major newspapers, and the justices themselves. Throughout this section, I utilize the findings of journal articles and other secondary sources that address the efficacy of reforms in Ohio and elsewhere.

In the final section, I place *DeRolph* in a broader schema of activist state judicial policy. I discuss how the failure of the initial *DeRolph* decision to effect change amounted might have amounted to a defeat for teachers' unions, children enrolled in underfunded public schools, and followers of the Brennan approach to state constitutionalism—but a defeat that I characterize differently from education activists such as Jonathan Kozol.⁵ I conclude by arguing that *DeRolph* serves as a case study in the limitations of subnational adjudication: although state constitutional challenges remain a useful mechanism for spurring recalcitrant legislatures into action, they cannot function as a substitute for substantive systemic reform of American public education. The *DeRolph* court eventually came to understand the limitations of its mandate; no

⁴ As noted in Douglas Reed, *On Equal Terms* (Princeton University Press), pp. 16-35: "A meaningful relationship exists between judicial intervention and changes in the revenues available to school districts."

⁵ e.g., Jonathan Kozol, *Savage Inequalities* (HarperPerennial, 1991).

amount of judicial oversight, however beneficent the judges' intentions, can hasten a haphazard process of education reform that has continued for 200 years despite its mixed results and lack of finite, quantifiable objectives.

4.1 CONSTITUTIONAL FRAMING AND THE ROAD TO DEROLPH

Ohio, like other states of the early American West, had benefited from reservations of federal lands for the maintenance of public schools—1/36th of every township in the Territory, as mandated by the Land Ordinance of May 1785—as well as the lofty exhortation, contained in the Northwest Territory Ordinance, that “schools and means of education shall forever be encouraged.”⁶ Ohioans included a specific reference to education in their first Bill of Rights, observing that “...knowledge, being essential to good government and the happiness of mankind, shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience.”⁷ At the second Ohio Constitutional Convention, and following on the heels of Ohio educator Calvin Stowe’s transnationally-themed “Report on Elementary Public Instruction in Europe,” delegates voted to include a new education clause that spelled out in clear language the state’s obligation to its public schools.⁸ Article VI, Section 2 of the new Ohio Constitution contained the first reference to a state’s affirmative duty to maintain a “thorough and efficient ”

⁶ Northwest Territory Ordinance art. III, § 14 (1787); 1 Stat. 51.

⁷ Ohio Constitution of 1802, art. VIII, § 3 (1802).

⁸ Calvin Stowe, “Report on Elementary Public Instruction in Europe,” was presented to the Governor of Ohio in 1837 and later reprinted by the legislatures of Massachusetts, Michigan, North Carolina, Pennsylvania, and Virginia. Stowe was particularly taken by the skillful quality of Prussian pedagogues and the strict pupil discipline enforced in the centralized Prussian school system. He also came to believe that “the Bible cannot be introduced into common schools” for fear of fostering a “sectarian bias.”

system of schools, language that would soon be adopted by twenty-two other states.⁹ Although the framers of the second Ohio Constitutional Convention did not provide precise definitions for terms like “common school” and “thorough and efficient,” one of the justices who decided *DeRolph*—upon surveying the work of Calvin Stowe, Stowe’s contemporary and Ohio’s first Superintendent of Common Schools Samuel Lewis, and the statements of various delegates to the convention—remarked that this standard was meant to be one of “excellence rather than mediocrity; and the education of the public was intended to be a fundamental function of the state.”¹⁰

Two subsequent constitutional conventions, in 1874 and 1912, only served to further enhance the centralized control of Ohio’s public schools. At the former convention, a handful of delegates attempted to strike language blocking the diversion of school funds to religious schools—non-sectarianism having been at the core of both Calvin Stowe’s education report and many of the 1851 delegates’ approach to education—in response to a handful of judicial setbacks including *Board of Education of Cincinnati v. Minor* (1872), an Ohio Supreme Court decision that held that the Ohio Constitution does not require that the Bible be used in schools despite that document’s vague reference to “religion...[being] essential to government.”¹¹ Catholics who were seeking to win their private schools a share of public education funds, taxpayers interested in restricting the size of the school system and the expansion of the “fancy branches” of its curriculum, and religious Protestants seeking to mandate the use of the Bible in daily classroom instruction were all sorely frustrated by the outcome of the convention. Its sole result was the

⁹ See William E. Thro, “The Role of Language of the State Education Clauses in School Finance Litigation,” 79 *Education Law Reporter* 19, pp. 23-24. According to Thro, frequent borrowing of such constitutional language by the framers of subnational constitutions has problematized the process of constitutional interpretation at that level.

¹⁰ *DeRolph*, 677 N.E. 2d at 772.

¹¹ *Board of Education of Cincinnati v. Minor*, 23 Ohio 211 (1872); Ohio Constitution, art. I, § 7.

state's need for a system of education owing to the fact that, in the words of one delegate, "the people must learn to think."¹²

The 1912 convention, faced with the challenge of an increasingly localized, marginalized, and difficult-to-operate system of public schools, aimed to "centraliz[e] the schools in Ohio" in order to alleviate the burden on small townships and sub-districts lacked the financial wherewithal to operate their schools on even a part-time basis.¹³ Enormous funding discrepancies in the public schools had inspired delegates to revisit the movement for standardization and centralization inaugurated by Calvin Stowe's 1837 report. The result—and about this there had been little dispute among the delegates—was the adoption of the following language in Article VI, Section 3 of the Ohio Constitution: "Provision shall be made by law for the organization, administration, and control of the public school system of the state supported by public funds." According to the report of the convention, such language was necessary "so that there can be no question about the control of the school systems as well as the handling of the school funds" and also to "establish definitely that the state shall for all time, until the constitution is further amended, have complete control over the educational system and that no city...or part of the state can withdraw itself...from the public educational system of the state."¹⁴

It would be a very long time, however, before the Ohio Supreme Court would have the opportunity to render an authoritative statement about what all of this constitutional language actually meant for students in Ohio's public schools. Was it merely hortatory language that enabled the state legislature to fund the public schools as it pleased, and thus a non-justiciable

¹² 2 Ohio Debates of 1874, at 2186 (a majority of the members of the committee had sought, and failed, to restrict the teaching of "fancy branches" of knowledge such as trigonometry, geology, and philosophy) and at 2217-2218 (remarks of Delegate Peas).

¹³ Thomas Harvey, then-Commissioner of Common Schools for Ohio, quoted in Jim B. Pearson & Edgar Fuller, editors, *Education in the States: Historical Development and Outlook* (National Education Association, 1969), at p. 957.

¹⁴ 2 Proceedings and Debates of the Constitutional Convention of the Ohio Constitution (1913), at 1499 and 1504.

issue in all instances save where the legislature was providing no funding at all? Or did it imply some duty to the students, perhaps even guaranteeing those students' fundamental right to an education? In 1981, the seven justices of the Ohio Supreme Court decided the first case that raised these issues. *Board of Education of Cincinnati v. Walter* had originated the Hamilton County Court of Common Pleas three years after the Supreme Court of the United States' ruling in *San Antonio Independent School District v. Rodriguez*.¹⁵ The plaintiffs in *Walter* challenged Ohio's method of funding its schools on various grounds—all of which were predicated on the more general claim that the “foundation program” in place at the time in the state, which guaranteed a certain minimum level of funding to each school district, provided insufficient aid to impoverished districts whose straitened conditions were described in Dickensian terms first in the plaintiffs' briefs and later even by the justices who decided *DeRolph v. Ohio*—and won at the trial court and Ohio Court of Appeals levels.¹⁶ Those lower courts read Ohio's constitution, unlike its federal counterpart, as containing language that did create a fundamental right to education for Ohio residents.

Ohio's Supreme Court, a body whose members are selected in supposedly “nonpartisan” elections but who are in fact nominated for election by the two major political parties, consisted at that time of four Democrats (Chief Justice Frank Celebrezze, a staunch Roman Catholic who eventually fell from power due to his questionable relationships with various organized crime figures; and Justices A. William Sweeney, William B. Brown, and Ralph Locher) and three Republicans (Justices Robert Holmes, Thomas Herbert, and Paul W. Brown) when it decided

¹⁵ *Board of Education v. Walter*, 390 NE 2d 813, 817 (Ohio 1981).

¹⁶ State aid to school districts takes one of three forms: flat grants, foundation programs, and percentage equalizing. Although a number of states previously relied on flat grants and equal distribution of funds to each district, today no state relies exclusively on such a system. See Mark G. Yudof et al., *Education Policy and the Law*, p. 593 (West, 1992).

Walter. Although partisan squabbles have not been not uncommon among elected judges, the Ohio justices voted six-to-one to overturn the decision of the lower court. William B. Brown wrote the majority opinion, with which five other justices concurred, and Ralph Locher wrote the dissent.

Brown's opinion relied on many of the same federal Supreme Court precedents utilized in other school funding decisions of the 1980s. He quoted Chief Justice Warren Burger on the importance of local control of the public schools: "Local control is not only vital to continued public support of the schools, but it is of overriding importance from an education standpoint as well...[because] the success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts."¹⁷ Brown also saw the wisdom in Justice Lewis Powell's position on acceptable levels of inequality: "While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system."¹⁸

Despite its apparent foreclosure of one avenue of opportunity for funding reformers, *Walter* also contained some language that prefigured the first *DeRolph v. Ohio* ruling. First, Brown explained that challenges to Ohio's school funding system were not nonjusticiable political questions.¹⁹ He then cited the discussion of the Ohio Constitution's education clause in

¹⁷ id. at 821, quoting *Wright v. Council of the City of Emporia* 407 U.S. 451 (1972) at 478.

¹⁸ id. at 822, quoting *Rodriguez*, 411 U.S. at 50, 51.

¹⁹ id. at 823. The defendant school board's use of certain language from *Baker v. Carr*, 369 U.S. 186 (1962), in which the U.S. Supreme Court held that the reapportionment of state legislative districts is not a political question, was unpersuasive on this point.

a prior decision, *Miller v. Korns* (1923).²⁰ The majority in *Miller* had upheld the statute in question—which concerned the legality of using property tax revenues raised in one district to help fund public schools in another, a point which had seemingly been resolved by the revisions made to the constitution in 1912 that established explicit state control of education funding—and included the following observation about Article VI, Section 2: “A thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part of any number of the school districts of the state lacked teachers, buildings, or equipment.”²¹ Based on his reading of this passage in *Miller*, Brown concluded that a school system could not be thorough or efficient if any school district in Ohio “was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity.”²²

Ralph Locher, who voted to sustain the lower court’s decision, authored a cogent dissent. Basing his analysis on an alternative interpretation of *Rodriguez*, Locher read Article VI, Section 2 as creating an *explicit* fundamental right to education: “Applying the ‘Rodriguez test’ [for determining whether rights are explicitly found in constitutions]...it follows that, in Ohio, educational opportunity is a fundamental interest entitled to strict scrutiny under Ohio’s Equal Protection Clause.”²³ Waxing poetic, he buttressed his conclusion with the claim that “the fundamental right to equal educational opportunity is the American Dream as incarnate as constitutional law.”²⁴ Relying on 400 pages of findings of fact about the wretched state of Ohio’s schools adopted by the lower court, Locher concluded that “there is a clear connection

²⁰ *Miller v. Korns*, 107 Ohio 287, 140 N.E. 773 (1923).

²¹ *id.* at 825.

²² *id.*

²³ *id.* at 827.

²⁴ *id.*

between the meager financial resources and the general malaise of many schools, particularly those located in urban areas of the state.”²⁵

4.2 DEROLPH V. OHIO AND THE OPENING OF A “DIALOGUE”

Sixteen years after the *Walter* decision, these problems had become more acute. The state school system in which named plaintiff Nathan DeRolph was enrolled still had too many underfunded schools—perhaps even more than before, in terms of relative dollar-per-pupil figures—that could not provide basic services to their students.²⁶ By the time *DeRolph v. Ohio* reached the Ohio Supreme Court, “crumbling plaster, leaky roofs, outdoor plumbing and coal bins-turned-classrooms...earned Ohio the dubious distinction of having the worst school buildings in the country.”²⁷ In 1990, the year before the litigation commenced, Ohio “ranked forty-eighth out of the fifty states in the extent of disparity of revenue and expenditure per pupil.”²⁸ According to a study done by Kern Alexander, a school finance expert and professor at Virginia Tech University, Ohio lagged far behind states of similar size and wealth in a number of significant categories, ranging from standardized test scores to computers-per-school.²⁹

The *DeRolph* plaintiffs were backed by the Ohio Coalition for Equity & Adequacy of School Funding, an association of education reformers representing school districts throughout the state. Five school districts—ranging from Youngstown in the northwest to tiny, isolated

²⁵ *id.*

²⁶ Suzanne E. Drummond, “Déjà Vu: The Status of School Funding in Ohio after *DeRolph II*,” 68 *University of Cincinnati Law Review* 435 (2000), at p. 441.

²⁷ Jim Siegel and Catherine Candisky, “School Funding: Has Ohio Fixed It?” in *Columbus Dispatch* (03-25-2007).

²⁸ *DeRolph v. Ohio*, 677 N.E.2d 733, 759 (Ohio 1997).

²⁹ Alexander’s report is available, in part, at the website of the Coalition of Rural and Appalachian Schools, which partially funded his research: <http://www.coras.org/early%20history.htm>.

Lima on the state's eastern border—served as named plaintiffs, along with a host of individuals including Nathan DeRolph. Represented by the Columbus law firm of Bricker & Eckler, the plaintiffs pursued a strategy built around arguing for the “inadequacy” of the extant system rather than its inability to create “equal” or “equitable” educational opportunities. As Michael Paris and others have noted, this approach—bringing together urban school districts with rural ones, heavily African-American districts with heavily Caucasian ones, and pursuing claims that seek only to raise the “foundation” of state funding rather than redistributing the considerable wealth of more prosperous districts—has generally proven a more successful litigation strategy, and, as noted in the preceding chapter, is characteristic of the so-called “third wave” of education finance litigation that began with the Kentucky decision in 1989.³⁰

Seven new justices sat on the court that heard *DeRolph*; none remained from the contingent that had decided *Walter*. Unlike that court, which had a Democratic majority, the *DeRolph* court contained five Republicans (Chief Justice Thomas Moyer and Justices Paul Pfeiffer, Deborah Cook, Andrew Douglas, and Evelyn Lundberg Stratton) and two Democrats (Justices Francis Sweeney and Alice Robie Resnick). Resnick and Sweeney favored upholding the Ohio Court of Appeals decision, which—faced with the imposing task of evaluating a massive trial court record, including the court's findings of fact, that ran to over 5,000 pages—had held Ohio's method of funding its schools to be unconstitutional.³¹ Douglas and Pfeiffer, who frequently voted with those two Democrats, supported them.³² Cook, a conservative jurist who was later considered as a potential nominee to the Supreme Court by the Bush

³⁰ Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* (Stanford Law Books, 2010). See also Yohance C. Edwards and Jennifer Ahern. 2004. “Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation,” 79 *New York University Law Review* 326 (2004), which uses bivariate analysis of a closed data set to demonstrate that this claim—at least in their opinion—is empirically verifiable.

³¹ Joe Hallet, “What Went on in the Supreme Court” in *Columbus Dispatch* (03-18-2007).

³² *id.*

administration and the McCain campaign team, took the position that school funding decisions were the province of the legislature and maintained this position throughout all four *DeRolph* rulings. Although Moyer and Stratton initially appeared to favor the majority position, both eventually voted with Cook.³³

Because of this, the majority could not use a six-to-one result to send a powerful call to action to the legislature and then-Governor George Voinovich. Nonetheless, Francis Sweeney's majority opinion offers a stinging rebuke of Ohio education policy as well as a neat clarification of several points of law: "By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul."³⁴

DeRolph featured a lengthy recounting of the egregious privations visited upon underfunded school districts. One school district operated with a barely-functioning high school science lab. Another district rationed the supplies given to its teachers, offering them a limited quantity of art supplies, chalk, and toilet paper while refusing to put their paychecks in envelopes to save paper.³⁵ Various schools in the plaintiff districts were found to lack functional heating and air conditioning systems, to contain unsafe amounts of asbestos in their insulation, and to have gymnasiums and other fitness facilities where the floors were so uneven that running and other physical activities were almost impossible.³⁶ According to *the 1990 Ohio Public School Survey*, which had been commissioned by the General Assembly, less than half of Ohio's schools had

³³ *id.*

³⁴ *DeRolph v. Ohio* 677 NE 2d 733, 747 (1997).

³⁵ *id.* at 762.

³⁶ *id.* at 764-765. For example, "When Chris Thompson was at Shawnee [School], the gymnasium had a leaking roof, and at one time part of the gym was flooded due to leakage. When a ball hit the ceiling while students were playing kickball or volleyball, part of the ceiling came down. The locker rooms below the stage area and adjacent to the gym had almost no water pressure, stunk, and were unfit for student use. Students changed clothes in two storage rooms next to the stage, but had no shower facilities available."

“adequate” electrical systems, 31% had “satisfactory” roofs, and a mere 17% had “safe” heating systems. Repairs to these facilities were estimated to cost over \$10.2 billion.³⁷

After recapitulating these complaints, Sweeney wrote that the language from *Miller* cited in *Walter*—that of schools “starved for funds”—clearly applied to an Ohio school system in such a state of disrepair. Furthermore, his analysis of the debates over the drafting of Article VI, Section 2 of the Ohio Constitution—as well as the West Virginia Supreme Court’s examination of those same debates—indicated to him that education was a fundamental right guaranteed to all Ohio residents, although this latter belief did not win the support of a majority of his colleagues.³⁸ From these two conclusions, he determined that Ohio’s present method of funding its schools was unconstitutional. In a concurring opinion, Justice Pfeiffer reemphasized this point, stating that “a system of funding that relies heavily on property taxes while producing such disparities and further exacerbates the disparities by providing state funds to wealthy school districts cannot be considered thorough and efficient.”³⁹

Chief Justice Moyer conceded in his dissent that “one cannot disagree with the aspirations of the majority to provide a school system that enables children to ‘participate fully in society,’ that provides ‘high quality educational opportunities,’ and that ‘allows its citizens to fully develop their human potential.’”⁴⁰ Nevertheless, he disagreed with the majority’s notion that “all schools [must] be of the same undefined level of high quality without relying on any

³⁷ id. at 744.

³⁸ id. at 772. The West Virginia Supreme Court, in *Pauley v. Kelley*, 255 S.E.2d 859, 867 (West Virginia 1979), wrote: “There was no explicit definition of the words ‘thorough and efficient’ that appeared in the final committee report which the 1851 Ohio Convention adopted. The tenor of the discussion, however, by those advocating the entire education section as it was finally adopted, leaves no doubt that excellence was the goal, rather than mediocrity; and that education of the public was intended to be a fundamental function of the state government and a fundamental right of Ohioans.” Despite this language and the language used by Sweeney in his opinion, the Ohio Supreme Court did *not* hold that education is a fundamental right for Ohio residents. Rather, the court held that the state needed to operate a thorough and efficient system of public schools and that the current system was neither. .

³⁹ id. at 781.

⁴⁰ id. at 782.

supporting text of the Constitution.”⁴¹ In his opinion, one could not equate “imperfect schools” with “an unconstitutional system of funding.”⁴² Echoing several earlier state supreme court decisions in other states with similar constitutional provisions, Moyer reiterated the position that the “thorough and efficient” language of Article VI, Section 2 was a “question of quality, which is a [non-justiciable] political question that the Ohio Constitution leaves to the legislature to determine.”⁴³

The majority opinion, which mandated reform but established no mechanism for accomplishing it, sparked an immediate controversy. George Voinovich, the so-called “Education Governor,” accused the justices of “legislating from the bench” at a press conference held the day after the decision.⁴⁴ Possibly influenced by members of Voinovich’s staff, the state’s major newspapers also criticized the decision. *The Columbus Dispatch* said that *DeRolph* was “one highly injudicious lurch” and published an op-ed piece by a law professor who argued that the Ohio Supreme Court should be stripped of its jurisdiction in this case; or, in the alternative, that the justices be impeached and the Ohio Constitution amended.⁴⁵ *The Plain Dealer* described the case as a “blank check” for spendthrift legislators. *The Cincinnati Enquirer* opined that “education policy for 11 million Ohio residents will be dictated in a rural flyspeck on the state map, by a county judge who answers to less than one-thousandth of our population.”

⁴¹ id.

⁴² id.

⁴³ id.

⁴⁴ Joe Hallet, “What Went on in the Supreme Court” in *The Columbus Dispatch* (03-18-2007).

⁴⁵ David N. Mayer, “Ohio’s School Funding Dilemma: Is the Court on the Right Track?” in *The Columbus Dispatch* (05-14-2000). According to Larry Obhof’s account of the legislative wrangling that accompanied the *DeRolph* litigation, many conservative members of Republican legislative caucuses began to contemplate legislation that would strip the court of its jurisdiction in school funding cases. See Obhof, “Ohio’s Long Road to an Adequate Education.” 2005 *BYU Education and Law Journal* 83 (2005).

And *The Blade* of Toledo appended the pejorative label “the Gang of Four” to the four members of the majority.⁴⁶

Justices Douglas and Pfeiffer were astonished by this harsh reaction. “We don’t have spin doctors...[so] it was like shooting fish in a barrel when they came after us,” Pfeiffer said.⁴⁷ Douglas said that he felt as if the justices “were on a lonely island” but he did not doubt for a moment “about whether what we did was right.”⁴⁸ Of course, progressive scholars in the legal academy authored short pieces lauding the *DeRolph* majority—but few of these writers were there in Columbus to offer succor to the embattled justices.⁴⁹

Following the first *DeRolph* ruling, Voinovich and the legislature attempted several hasty reforms. Voinovich endorsed a penny-on-the-dollar sales tax increase, designed to raise \$1 billion dollars, that was put before Ohio voters and soundly defeated. The legislature made several changes to its school funding formula and appropriated millions of dollars for facilities upgrades. But this proved insufficient; in 1999, the trial court held that the legislature had not complied with the *DeRolph* ruling. This holding was appealed to the Ohio Supreme Court.⁵⁰

In this second installment of *DeRolph v. Ohio*, several questions left unanswered by the first holding reemerged. The plaintiff districts again asked the Ohio Supreme Court to hold that education was a fundamental right, an issue that had been raised but not resolved in the prior case. And although the Ohio General Assembly had passed several pieces of legislation since *DeRolph I*, this legislation had the effect of merely increasing the overall state allocation for education rather than redressing the imbalance between state and local spending.

⁴⁶ Hallet.

⁴⁷ *id.*

⁴⁸ *id.*

⁴⁹ e.g., “Ohio Supreme Court declares State’s Public School Financing System Unconstitutional” appeared in 111 *Harvard Law Review* 855 (1998) soon after *DeRolph* came down. In the note, this decision was described as “a step in the right direction.”

⁵⁰ *id.*

Justices Cook, Moyer, and Stratton remained in opposition to the original holding. Justice Pfeiffer argued with Douglas, Sweeney, and Resnick to support an order, not unprecedented in the history of separation of power conflicts in Ohio, that would instruct legislators to stop all spending until they resolved the education crisis.⁵¹ Those three justices refused to follow Pfeiffer's dramatic suggestion but did form a block that reaffirmed the original *DeRolph* holding.

Justice Resnick was assigned to write the majority opinion. She urged legislators to correct state-local funding disparities even as she heaped praise upon the General Assembly and new Governor Robert Taft for their concerted if imperfect response to the problem. While acknowledging that the new funding packages fell short of its constitutional obligations, Resnick underscored "the progress the General Assembly has made in this area" despite a continuing "problem of overreliance on local property taxes that must be independently addressed."⁵² Her opinion remained silent on the issue of whether education was a fundamental right guaranteed to Ohio citizens, but it did restate the burden imposed on the General Assembly by Article VI, Section 2 of the Ohio Constitution.

In a remarkably self-aware concurrence, Justice Douglas heaped praise on Robert Taft for his adroit handling of this matter: "Central to all of this is the role of Bob Taft...[a] governor who [has chosen] to lead. The attention he and his staff have devoted to the school facilities

⁵¹ During the 1985 savings-and-loan collapse, the Ohio Supreme Court issued a similar order, which brought government activity to a standstill and forced a swift legislative response. The legitimacy of such an order is itself uncertain; Ohio has no formal 'separation of powers' doctrine, a matter that would be addressed in later parts of the *DeRolph* rulings. Pfeiffer—a self-described "gentleman farmer" with "a herd of Angus that know him as the guy with the hay"—offered the following rationale for his position: "I knew it would create a bit of a constitutional crisis and (legislators) would be enormously angry at us, but I always thought that was the answer to this. Blame the court and do what's right, and go home and say, 'Geez, folks, the court made us do it.'" Joe Hallet, "What Went on in the Supreme Court" in *Columbus Dispatch* (03-18-2007) and Pfeiffer's own website (<http://www.sconet.state.oh.us/SCO/justices/pfeiffer/>).

⁵² *DeRolph v. Ohio*, 728 N.E.2d 993, 1008 and 1015 (Ohio 2000).

problem has been extraordinary.”⁵³ To prove this point, he cited an editorial in the April 13, 2000 *Columbus Dispatch* that claimed that Taft had “taken the court’s ruling seriously and reoriented state priorities to put education needs at the top of the list.”⁵⁴

In contrast to his fulsome treatment of Taft, Douglas criticized former Governor George Voinovich as well as the dissenting justices. After discussing the efforts of Michigan Governor John Engler to overhaul Michigan’s education funding system without judicial interference, Douglas lambasted the dissenters as “problem maker[s]” who “would continue the status quo by saying, ‘Let George do it.’”⁵⁵ Unfortunately for Ohio residents, “‘George’ hasn’t done it...[and] was nowhere to be found until our decision in *DeRolph I*.”⁵⁶

Chief Justice Moyer used his dissent to restate his alternative interpretation of Article VI, Section 2 and to present research about the ineffectiveness of increased education expenditures as a method of boosting student performance. Adducing a student law review note that itself cited a *Plain Dealer* analysis of Ohio school outputs and inputs, Moyer argued that “factors related to families and economic opportunity—not school districts—most influence how well students perform on standardized tests.”⁵⁷ Although somewhat distressing for advocates of funding reform, this claim—articulated forcefully in James Coleman’s 1966 *Equality of*

⁵³ id. at 1023.

⁵⁴ id.

⁵⁵ id. at 1026. Douglas noted in a footnote that “George” is “generic in nature and makes reference to no particular individual, alive or dead.” Despite this disclaimer, the intent of his earlier remarks is obvious.

⁵⁶ id.

⁵⁷ 1034. Moyer referenced Steven Rodgers, “Centralized Wisdom? *DeRolph v. State* and the Rise of Judicial Paternalism,” 45 *Cleveland State Law Review* 753, 765-766 (1997). The author of this somewhat confusing note appears to have misinterpreted the actual holding of the first *DeRolph* ruling—a forgivable error given the length (70 pages) and complexity of that decision.

Educational Opportunity Study—has been reaffirmed in several longitudinal studies of student performance in states that have undertaken significant reforms of their school finance systems.⁵⁸

Following *DeRolph II*, Justice Resnick faced a difficult election challenge from Ohio attorney Terrence O'Donnell. O'Donnell hoped to take advantage of the toxic atmosphere that prevailed in the wake of the second *DeRolph* decision as well as *Ohio Academy of Trial Lawyers v. Sheward*, a tort reform case in which Resnick had stated that caps on tort recovery were unconstitutional because they violated citizens' rights of due process.⁵⁹ O'Donnell raised over \$1.3 million—to Resnick's \$790,000—and, with the full support of the Ohio Chamber of Commerce, commenced an ugly campaign characterized by the inflammatory “attack ads” produced by his backers.⁶⁰ Although most of the advertisements focused on Resnick's perceived deference to the “plaintiff's bar” of trial lawyers, a few referenced her role in the *DeRolph* litigation. One such ad depicted students who had been left unattended in the classroom, with voiceover narration noting that “Justice Resnick had blocked the legislature's effort to ensure that teachers spend more time in the classroom” before going on to state that “today in Ohio, instructors learn and students teach, in spite of Alice Robie Resnick.”⁶¹ O'Donnell, for his part, disavowed that advertisement and others that the groups supporting him had run on his behalf—“I want to run a positive campaign and have not spoken negatively about my opponent,” he explained—and wound up losing a race that, at least by the standards of judicial elections, was

⁵⁸ See Helen Ladd's *Making Money Matter* and Arthur Wise's *Rich Schools, Poor Schools* for an even fuller discussion of this subject.

⁵⁹ *Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E. 2d 1062 (Ohio 1999).

⁶⁰ T.C. Brown, “2 Campaigns for Top Court Exceed \$6 Million: Spending, Attack Ads Some of the Worst in Country,” *Plain Dealer* (12-27-2000). Issue-based groups such as the Ohio Chamber of Commerce that had been adversely affected by Resnick's stance on tort reform also opposed her, and wound up spending several million dollars in the unsuccessful effort to replace her with O'Donnell.

⁶¹ Spencer Hunt, “Campaign 2000: Anti-Resnick Ad Pulled, Replaced,” *Cincinnati Enquirer* (10-25-2000).

reasonably close.⁶² Ohio State Senator Larry Obhof and others have made much of the fact that Resnick was challenged, at least in part, based on her role in the *DeRolph* decision—but voter outrage over an education finance decision has never once led to the electoral defeat of any state supreme court justice.⁶³

Months after Resnick’s election victory, the General Assembly continued to manipulate its education funding scheme in order to allocate additional monies to underfunded school districts. In June 2001, the Ohio Supreme Court held hearings on whether these measures satisfied Article VI, Section 2. Because of the tumult precipitated by the previous rulings, Chief Justice Moyer was eager to rid the docket of this controversial case. For the third installment of *DeRolph*, he persuaded Justices Pfeiffer and Douglas—no strangers to swing voting—to leave the original majority and sign on to a new holding with him and Justice Stratton.⁶⁴

In this new majority opinion, Moyer attempted to satisfy the other three justices while giving a final bit of guidance to the legislature. He discussed the various perspectives adopted by his colleagues, noting that Justice Douglas “expressed the belief that the court...should declare education to be a fundamental right afforded to each Ohio child pursuant to the Equal Protection Clause of the Ohio Constitution” while Justice Cook believed “that the court exceeded its proper role in addressing the merits of this case.”⁶⁵ While their positions may have differed

⁶² *id.*

⁶³ Larry Obhof, “Ohio’s Long Road to an Adequate Education.” 2005 *BYU Education and Law Journal* 83. For more about what issues *are* salient in judicial elections—to date, decisions regarding the death penalty and gay marriage, as well as gross personal incompetence and criminal behavior on the part of the justices running for re-election—refer to Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (Routledge, 2009). Furthermore, as noted in the previous chapter—a state’s method of selecting its justices has no bearing on the outcome of education finance litigation, and party affiliation (Democrat/Republican) only a slight correlation with positive and negative outcomes, respectively. For more on that subject, see Karen Swenson, “School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?” 63 *Albany Law Review* 1147 (2000).

⁶⁴ *DeRolph v. Ohio*, 754 N.E.2d 1184 (Ohio 2001).

⁶⁵ *id.* at 1189.

“with respect to whether the legislature or the judiciary has the ultimate authority to determine if the goals have been achieved...we all agree upon the fundamental importance of education to the children and citizens of this state.”⁶⁶ Following that declaration, Moyer undertook the sort of rigorous quantitative analysis of legislative funding measures that occupied much space in prior decisions. By this point, that discussion—recounted in painstaking detail in a law and economics treatise, *The DeRolph Case: Ohio’s struggle for a constitutional finance system*, that contained the full text of the two previous rulings as well as numerous charts, graphs, and statistical models—had reached a level of sophistication that exceeded even the appellate attorneys’ ability to articulate it.⁶⁷

Nevertheless, Chief Justice Moyer placed his faith in a funding scheme limned in the body of his opinion—a modification of the scheme already in place minus portions severed by the court. If the General Assembly followed this scheme—which was later shown to contain a woeful underestimation of the amount of money that the state would have to spend—“the plan will meet the test for constitutionality created in *DeRolph I* and *DeRolph II*.”⁶⁸ Thus, Moyer ordered “the state...to implement the changes described above” but, owing to “the defendants’ good faith,” decided that the Ohio Supreme Court would not retain jurisdiction of the case.⁶⁹

In order to forestall “the inevitable criticism of each of us individually and all of us collectively that is sure to follow,” Justice Douglas wrote a concurring opinion that contained an

⁶⁶ *id.*

⁶⁷ Richard Lucier, *The DeRolph Case: Ohio’s struggle for a constitutional finance system* (Thomson Custom Publishing, 2001). This book, written by a Denison University economics professors, focuses on the financial statistics put forth by both parties to the litigation, and notes that one constant in the *DeRolph* litigation was that no one seemed to have an especially firm grasp on this subject.

⁶⁸ *DeRolph v. Ohio*, 754 N.E.2d 1184, 1201 (Ohio 2001). Moyer estimated that the reforms would cost \$300 million dollars. Subsequent estimates placed the cost of these reforms at \$1.2 billion dollars.

⁶⁹ *id.*

intricate discussion of Ohio's separation of powers doctrine as it applied to *DeRolph*.⁷⁰ After a disquisition on the oaths sworn by public officials in all branches of government, Douglas posited his understanding of the Ohio Supreme Court's role in this drama. "Out of deference to the General Assembly," he wrote, "we have recognized that the scope of our review is limited to determining whether the funding method meets the educational mandate of the Ohio Constitution."⁷¹

Justice Sweeney, the writer of the majority opinion in *DeRolph I*, dissented, "find[ing] it incredible that the majority takes it upon itself to make unconstitutional legislation constitutional."⁷² Beyond the "good faith" of the defendants, he wrote, "what assurances do we have that these changes and the rest of the current plan will be fully implemented?"⁷³ Nothing in the new majority, in his view, remedied the "overreliance on property taxes" that plagued the legislation at issue in the previous rulings.⁷⁴

Gross fiscal miscalculations led Governor Taft to request that the court reconsider *DeRolph III* after it had been handed down. The justices had not expected the cost of reform to be so high; Justice Stratton said that she was "truly taken aback" while Chief Justice Moyer observed that "the amount [of the miscalculation] was so high that the state would have filed for reconsideration regardless of what anybody said."⁷⁵

As the justices prepared to hear *DeRolph IV*, new concerns loomed. Justice Douglas would reach mandatory retirement age at the end of the 2001 term, and Chief Justice Moyer

⁷⁰ *id.* at 1202.

⁷¹ *id.* at 1204.

⁷² *id.* at 1241.

⁷³ *id.*

⁷⁴ *id.*

⁷⁵ Joe Hallet, "What Went on in the Supreme Court" in *Columbus Dispatch* (03-18-2007).

thought that “it was crucial for the case to end on this court’s watch.”⁷⁶ But Moyer would not be part of the final majority: Douglas, Pfeiffer, Resnick, and Sweeney reunited to prevent any attempt to rescue the *DeRolph III* holding. While Moyer “still felt that we should put an end to it by telling the General Assembly what you need to do,” the others wanted no part of such a solution.⁷⁷ Justice Douglas considered “order[ing] [Treasurer Joseph Deters] not to pay the General Assembly, or the court, until this matter is resolved.”⁷⁸

Sweeney, however, believed that the court needed to get rid of the case. He suggested the idea to Justice Pfeiffer, who “went home and got on the tractor and thought about it for a while...[before] conclud[ing] that Francis was right, and the best position in which we could leave the school districts of this state that brought this litigation was one final declaration that it’s still unconstitutional, dismiss the case, and then (the state) can’t come running back with a new court and suddenly get it blessed as constitutional.”⁷⁹ With the support of Justice Stratton, who agreed to support the decision to remove the case while refusing to change her vote as to its unconstitutionality, the court voted to affirm its original holding and relinquish its jurisdiction.

In the last majority opinion in this set of rulings, Justice Pfeiffer “direct[ed] the General Assembly to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences.”⁸⁰ Pfeiffer again recounted constitutional history. Based on his reading of this history, he reasoned as follows: The framers wanted a thorough and efficient system of common schools; the current system was not thorough

⁷⁶ *id.*

⁷⁷ *id.*

⁷⁸ *id.*

⁷⁹ *id.* According to the article, Ohio’s sitting justices—elected by the state’s voters to six-year terms—feared that the unpopularity of the decision would be seized upon by challengers as a way of winning their judicial elections. Upon taking office, these new justices might rehear and then overturn this important holding, thereby vitiating the prior court’s determination that Ohio’s method of funding its schools was neither thorough nor efficient.

⁸⁰ *DeRolph v. Ohio*, 780 N.E.2d 529, 530 (2002).

and efficient; and because of this the current system was unconstitutional. While conceding that “the General Assembly cannot spend money it does not have,” Pfeiffer explained that “the Constitution protects us whether the state is flush or destitute.”⁸¹ Justice Resnick added in her brief concurring opinion an exhortation to the Ohio voters to “pass a constitutional amendment to the Thorough and Efficient Clause...which for all time will require an adequate amount of funding to be spent on every Ohio student regardless of where in the state that child resides.”⁸²

4.3 THE LEGACY OF DEROLPH

Even as *DeRolph* served the admirable purpose of exposing the shameful conditions of the state’s schools, the remedy that the majority sought to fashion was never fully implemented. Although the state of Ohio earmarked billions of additional dollars for its public schools, the percentage of the cost of a student’s education borne by the state remained static. In 1997, the state paid 45 percent of this cost; in 2007, that figure had increased slightly, to 45.5 percent.⁸³ While state funding increased by over seven percent during each year that the court retained jurisdiction over *DeRolph*, it has increased by only two percent per year since the court released that jurisdiction.⁸⁴

Perhaps the newsworthiness of the case and the angry reactions it engendered spurred the General Assembly to action; perhaps the removal of those stimuli has caused it to rest on its laurels. At any rate, such speculations exceed the purview of this chapter. All that I can write

⁸¹ id. at 532.

⁸² id. at 534. No such amendment passed in the years following *DeRolph IV*.

⁸³ Jim Siegel and Catherine Candisky, “School Funding: Has Ohio Fixed It?” in *Columbus Dispatch* (03-25-2007). Most of these additional funds were spent on facilities construction in at-risk Ohio school districts.

⁸⁴ id.

with certainty is that, twelve years after *DeRolph I*, Ohio's continuing reliance on property taxes in funding local schools has created disparities greater than those that obtained prior to that decision, even with the infusion of more than \$5 billion in state aid.⁸⁵

Even the states cited in the *DeRolph* decisions as exemplars of judicial and legislative reform—Massachusetts, Kentucky, Connecticut, New Jersey, and Vermont—have experienced mixed results. While school districts in these states have achieved some rough measure of funding parity, the additional dollars that have been spent purchased negligible increases in student performance and parent satisfaction.⁸⁶ Test scores have increased slightly, but this has been attributed to a shift in curriculum—an increase in time devoted to “teaching to the tests.”⁸⁷ And some schools in southern Ohio, which received considerable attention in the “horror story” section of *DeRolph I*, still remain in a state of extreme need.⁸⁸ The lasting legacy of *DeRolph* might prove to be facilities construction, with billions of dollars set aside for that objective, although the process of allocating this additional funding has been plagued by corruption and cronyism.⁸⁹

⁸⁵ *id.* And here I mean disparities between the state's richest and poorest districts. Although all districts in the state now receive more state funding than they did prior to *DeRolph*, rapid funding increases in the richest districts (spurred by increases in property tax revenues that have occurred for reasons unrelated to that decision) have widened the gap between the upper ten percent of school districts and the bottom percent. cf. Jim Siegel, “Stuck in the middle with less” in *Columbus Dispatch* (03-21-2007) and Catherine Candisky, “Suburban abundance” in *Columbus Dispatch* (03-20-2007).

⁸⁶ William Duncombe and Jocelyn Johnson, “The Impacts of School Finance Reform in Kansas: Equity is in the Eye of the Beholder”; Ann Flanagan and Sheila Murray, “A Decade of Reform: The Impact of School Reform in Kentucky”; Julie Berry Cullen and Susanna Loeb, “School Finance Reform in Michigan: Evaluating Proposal A”; Jennifer Imazeki and Andrew Reschovsky, “School Finance Reform in Texas: A Never-Ending Story”; and Thomas Downes, “School Finance Reform and School Quality: Lessons from Vermont.” All of these articles were published first in various journals but have since been collected in John Yinger's *Helping Children Left Behind: State Aid and the Pursuit of Educational Equity* (MIT Press, 2004).

⁸⁷ Jim Siegel and Catherine Candisky, “School Funding: Has Ohio Fixed It?” in *Columbus Dispatch* (03-25-2007).

⁸⁸ Candice Candisky, “Decades of gains dissipating” in *Columbus Dispatch* (03-24-2007). In this article, Candisky examined worsening conditions in Southern Local School District.

⁸⁹ *id.* But see David Varda, quoted in “School Funding: Has Ohio Fixed It?”: “You can argue that, on the school-facilities spending, you probably can't find another state that's undertaken it like Ohio has.” Even if this claim is not *entirely* accurate, Ohio was among the ten states that allocated the most funds for facilities construction (as a percentage of their state education budgets) from 2002-2004. The problems with the allocation of these state

Putting aside such criticisms, one must concede that the Ohio Supreme Court operated as well as can be expected under difficult circumstances. Decisions that appear predetermined when studied in the abstract—as disembodied strings of holdings, useful for arguments, projections, and little besides—are actually the result of fraught negotiations among policymakers faced with a host of paradoxical pressures. Elections, other elected officials, their own partisan loyalties and ethno-religious prejudices: The justices had to account for all of these factors as they attempted to arrive at a fair and sustainable result. In the end, they conceded defeat—but not before making an important statement. At times, this is all that even the most “activist” judges—who of course must operate without the power of sword or purse—can hope to accomplish.

In *Savage Inequalities*, Jonathan Kozol described the defeat of school funding reformers in San Antonio and elsewhere as “a tragedy” because “all our children ought to be allowed a stake in the enormous richness of America...[w]hether they were born to poor white Appalachians or to wealthy Texans, to poor black people in the Bronx or to rich people in Manhasset or Winnetka.”⁹⁰ However, it is precisely those accidents of birth and environment—considered by many education researchers to be the primary determinants of academic success—that may preclude the achievement of true equality even if these funding dilemmas were resolved.

Could the justices have handled *DeRolph* differently? Was “punting” the matter back to the legislature after engaging in a “dialogue” with the other branches of government the best way to proceed in these circumstances? It is this question that I plan to address—with the assistance

funds—much of which were used to hire administrators and support staff rather than teachers—are discussed in Candisky’s article “Decades of gains dissipating.” Nepotism might have been the motivation behind some of these hires.

⁹⁰ Jonathan Kozol, *Savage Inequalities* (HarperPerennial, 1991), p. 233.

of social science research, insights from justices who have participated in this litigation, a discussion of recent developments in the long-running *Abbott* litigation in New Jersey, and the curious example of a 2004 Alabama referendum on the outdated, segregation-era education provision in that state's constitution—in my concluding chapter.

5.0 CONCLUSION: REFLECTIONS, REMEDIES, AND PROSPECTS

In the last chapter, I charted the trajectory of the *DeRolph v. Ohio* school finance litigation. That case had a remarkably short “shelf life,” with the Ohio Supreme Court ending its jurisdiction of the matter after six tumultuous years. In 2006, Democrat Ted Strickland was elected to serve as Governor of Ohio. Working in conjunction with a Democratic State House of Representatives, Strickland fashioned an appropriation bill that would have increased the state’s share of education spending by over 7%. The bill passed the House in early 2010, and a watered-down version was then put before the Ohio State Senate. Before Strickland’s vision of school finance reform could come to fruition, he was defeated by former U.S. Representative John Kasich in a hotly contested 2010 election.¹ Kasich, who entered office with his own set of priorities, tabled discussion of Strickland’s reform legislation. Thus, school reform in Ohio, emanating this time from the branches of government that had traditionally handled such matters, once again became a “back burner” issue.

Two aspects of this scenario are relevant to the chapter that is about to unfold. First, school finance reform was reignited by a single, popularly elected individual. Strickland prioritized education reform and very nearly succeeded at implementing it in a short period of time. Second, this “moment” was much narrower and more tenuous than the outcome of a state

¹ Access Network, “Ohio on Track for Constitutional Compliance?” Accessed at <http://www.schoolfunding.info/news/policy/04-09-09Ohio.php3>.

supreme court case: by changing executives, the people of Ohio effectively shifted the state's priorities. One is left to wonder, then, what constitutes the most efficacious method for redressing school finance inequalities: via elections, or via the courts?²

I explore that question in the first section of this chapter. In the course of addressing it, I discuss how judicial decisions for plaintiffs have led, on the aggregate, to moderate, systemic funding increases. I proceed from there to a brief survey of the circumstances by which some of the state supreme courts discussed in chapter three—noted for their “landmark” decisions—came to terminate their jurisdiction of school finance litigation during the first decade of the 21st century. I then evaluate concerns raised by some scholars regarding the continued viability of “adequacy”-based litigation theories, in the process adverting to how there were so few notable state supreme court holdings on the issue of school finance during that decade. I close this section with a reflection on the lengthy *Abbott v. Burke* (1985) litigation, focusing my attention on the New Jersey Supreme Court's twenty-first holding in that case and Republican Governor Chris Christie's subsequent forceful response to it.³ Christie's well-coordinated, if ultimately unsuccessful, campaign against the New Jersey Supreme Court suggests that some of the earlier “advantages” the judiciary was believed to possess, such as insulation from the political process, may be effectively used against justices interested in attempting to mandate that the other two branches of government implement specific reforms.

² Sol Stern puts it thusly in “The March of Folly,” his short, tendentious account of school finance litigation in New York: “While all that energy was consumed in the courtroom, and so many smart people wasted their time trying to answer an unanswerable question, the political process has, willy-nilly, moved along...[and] the amount of money going to the city's schools has almost doubled. It happened through the give and take of democratic politics, as flawed as that politics is in New York, rather than by having a judge arbitrarily impose spending increases on unwilling taxpayers.” In Eric A. Hanushek (ed.), *Courting Failure* (Hoover Institution Press, 2006), p. 33. Stern's take on the matter is quite obvious from this passage. The real answer, of course, is far more complicated than that.

³ *Abbott v. Burke*, 100 New Jersey 269 (1985); *Abbott v. Burke*, M-1293-09 (2011).

The second section of this chapter focuses on a curious moment in Alabama’s recent past where voters rejected an amendment that would have removed segregation-era language from the state’s education clause. In its place, the amendment would have opened the door to the drafting of a more modern education clause—one that might have stated that education was a “fundamental right” or “fundamental value” of the state. However, a ferocious anti-tax campaign led by a former state supreme court justice and the president of the state chapter of the Christian Coalition, ensured that the measure was rejected by the slimmest of margins. This vote, one of dozens that take place every year as state constitutions continue through processes of constant revision and amendment, received modest national media attention even as its deeper implications passed unnoticed. Returning to the discussion of school finance inequities in the “Jim Crow” South presented at the beginning of Chapter Three, I argue that this situation affords us many useful insights into American attitudes toward education, providing concrete evidence of how faith in educational equality “dims when held in the bright light of competing norms and conflicts, like localism, ideological differences, and racial divides.”⁴

The last section of this chapter concerns solutions to the challenges presented by the state-by-state school finance litigation that has occupied the attention of many state supreme courts during the past years. Although these jurists have not acted in vain, they have had to work within institutional constraints that have limited their effectiveness. I begin the section by gently critiquing the claim, advanced by Michael Rebell, that lengthy court oversight of these decisions is the best “practical” solution. From there, I evaluate a new litigation theory that may offer the possibility of reform through the federal courts. While this “federal turn” is promising in the abstract, it seems unlikely to sway the currently right-leaning federal judiciary responsible for

⁴ Douglas Reed, *On Equal Terms* (Princeton, 2001), p. 123. This was Reed’s conclusion after conducting extensive polling to determine voter attitudes toward educational opportunity.

such recent decisions as *Parents Involved in Community Schools v. Seattle School District No. 1* (2007). Finally, I offer my own proposal: in light of data showing how uncompetitive the individual states are with regard to most industrialized nations, it seems that only an amendment to the federal constitution creating a unitary national public school system could possibly yield the results that most reformers desire. Since many of the nations that are “lapping” the United States in terms of educational performance have unitary or more highly centralized school systems, it behooves policymakers in the United States to consider endorsing such a radical solution.

5.1 HOW MUCH IS TOO MUCH? ABBOTT AND THE LIMITS OF JUDICIAL OVERSIGHT OF SCHOOL FINANCE LITIGATION

The intervention of state supreme courts in school finance reform has been a difficult exercise, but it has not been, as some detractors would claim, a vain and pointless one.⁵ In *The Hollow*

⁵ An important note must be made here: the word “success,” in this context and in any other, is only significant in the context of the goal to be evaluated. If, for example, my goal was to gain 50 pounds and I accomplished this, then I was “successful”; if my goal was to have lost a certain percentage of body fat and I gained 50 pounds, then I most likely would not have been (absent an extraordinarily rigorous regimen of physical exercise and chemical “doping”). The same reasoning applies to the use of words such as “efficient”: yes, a completely free market would be “efficient” in the sense that it would “efficiently” consolidate wealth in the hands of a few individuals; but if the aim of “efficiency” was defined as providing a uniform standard of living for all people, then it would obviously not be “efficient.” Those who support school finance reform view “success,” by and large, as any outcome that results in the distribution of additional money to the public schools (and, for sake of the simplicity, that is how it will be used in this chapter). Those who oppose it do not quibble with the fact that it results in increased spending; rather, they suggest it has been “unsuccessful” because their definition of “success” is concerned with “outcomes” (graduation rates, standardized test scores, etc.). And, in the main, there has not been a strong correlation between increased spending and improved outcomes, although there is a growing body of recent research that calls that into doubt. For example, in “Public School Funding and Performance,” *FREC/CANR Conference Papers at the University of Delaware*, John Mackenzie analyzes 2002-2003 state level public education finance and performance data and concludes that “there is a significant positive relationship between overall per-pupil funding and NAEP scores.” It also bears noting—and I will repeat it later in this chapter—that in Alabama, a state where a school finance lawsuit has never been successful, 2.3% of students scored highly on standardized math tests and 1.8%

Hope, law professor Gerald Rosenberg argued that three constraints typically prevent courts—in his study, the Supreme Court—from effecting social change.⁶ These constraints have been discussed in the previous chapters, but bear repeating here: the need for a case/controversy to review; the inability to implement policy decisions owing to a court’s lack of access to either the “purse” or the “sword”; and the inability to proceed in the face of significant opposition from the other two branches of government. The nature of these limitations has been understood for a very long time,⁷ and they have certainly curtailed the ability of some supreme courts to achieve the rapid implementation of their mandates.⁸ In *The Hollow Hope*, Rosenberg leans heavily on research suggesting that *Brown v. Board of Education* desegregation decision was not followed in any significant respect until after the passage of the 1964 Civil Rights Act (“CRA”). This claim, however, severely understates the positive impact *Brown* made on the nascent civil rights movement.⁹

Funding increases owing to school finance litigation are, of course, not directly implemented by state supreme courts,¹⁰ and attempts by certain courts to dictate precise funding formulae (as had been the case in *DeRolph v. Ohio*) have met with failure. However, many courts have been successful at forcing state legislatures to act, in most cases without the decade-

scored highly on standardized reading tests. In Finland, a nation with a unitary education system, those numbers were 20.4% and 5.3%, respectively. Of the five US states that are even remotely competitive with the rest of the First World on standardized math tests (i.e., that rank within the “top 30”), four have had plaintiff’s liability victories at the state supreme court level: Massachusetts, Vermont, New Jersey, and Washington. In the only state that has not, Minnesota, plaintiffs lost their 1993 suit, *Skreen v State*, 505 N.W. 2d 299, only because the court held that, unlike in several neighboring states, “the state’s portion of the funding is equally distributed—and admittedly provides the funding for an adequate education.” Source: *Education Next*, as made available in *The Atlantic* at <http://www.theatlantic.com/national/archive/2010/11/your-child-left-behind/66069/>.

⁶ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, 1991).

⁷ It is, after all, addressed in Alexander Hamilton, “Federalist No. 78,” a work upon which Rosenberg relies heavily: “The judiciary has no influence over either the sword or the purse, ...It may truly be said to have neither force nor will, but merely judgment.” Accessed at <http://www.constitution.org/fed/federa78.htm>.

⁸ As is discussed in the conclusion of the previous chapter.

⁹ See Susan E. Lawrence, “Review of *The Hollow Hope*,” 86 *American Political Science Review* 812.

¹⁰ i.e., the courts do not pass the appropriation bills.

long “lag” that separated *Brown* from the CRA. Thus, the “lack of purse or sword,” while in some sense a “constraint,” can be mitigated by the development of an effective “dialogue” with legislatures that have been motivated to reexamine systemic funding disparities in the wake of a court decision.¹¹

In his study of financial impact of favorable and unfavorable judicial decisions on school finance litigation, Douglas Reed determined that, in five states where plaintiffs prevailed, there was, over the course of nine years, a 29.38 percent decline in levels of inequality among the schools in those states.¹² His research was not concerned with how revenues increased at the top and bottom levels, but rather with how “transfers to all districts [affected] revenue distribution.”¹³ From this, he concluded that “we see all states indicate increasing equity (whether modest or great) after the state supreme court decisions that invalidated the school finance system.”¹⁴ In the three states where plaintiffs had not prevailed, Reed determined that levels of inequality among districts were either flat, as in North Carolina (which would later hold that its system of school finance was unconstitutional, and where the legislature was already working on school funding solutions), or significantly worse, as in Oklahoma (a 13.6% increase in levels of inequality after the court’s unfavorable decision) and Illinois (19%).

¹¹ As was the case with the *Rose* decision in Kentucky, where afterwards “legislative leaders announced their immediate agreement to set up a twenty-one member Task Force on Education Reform, consisting of six legislative leaders and five people appointed by the governor.” Paris, *Framing Equal Opportunity*, p. 201. Sandy Levinson stresses the importance of the roles of courts as “dialogue participants” in his recent law review article, noting that the state courts—representing more manageable geographic units—are better positioned than the US Supreme Court to initiate a dialogue with the public and with the other branches of government. He does not believe, however, that judicial elections, or anything else that would make these judges more attentive to the will of the majority, are necessary accompaniments of such a constructive “dialogue.” “Courts as Participants in a ‘Dialogue,’” 59 *University of Kansas Law Review* 791 (2011).

¹² Reed, *On Equal Terms* at p. 29. The five states where plaintiffs prevailed were New Jersey, Tennessee, Texas, Kentucky, and Connecticut. The three states where defendants prevailed at the state supreme court level were North Carolina, Illinois, and Oklahoma.

¹³ *id.* at 26.

¹⁴ *id.*

Reed's work was impressionistic; he selected the "unfavorable" examples in his sample because he believed they mirrored the "favorable" examples. For example, he argued "we can compare North Carolina outcomes to outcomes in Kentucky because these are Southern or border states in which Appalachian rural poverty constitutes a significant feature of school financing inequalities."¹⁵ Illinois and New Jersey were comparable because of their "urban, predominantly black poverty."¹⁶ Reed's findings, however, have been confirmed on a much larger scale: economists Matthew Springer, Keke Liu, and James Guthrie used data from the US Census of Governments' School System Finance to determine that court-mandated reforms both "decreased horizontal inequity" among districts (as Reed had claimed in his much smaller sample) and led to increased spending on education.¹⁷

Of course, the argument over school finance litigation has never been primarily about whether or not states wind up spending more money on their public schools. Some states, such as Ohio, *have* wound up spending less than, say, New York and New Jersey in response to this litigation—partly due to a shorter period of supervision and partly due to the state supreme court's inability to develop a constructive "dialogue" with the other branches of government.¹⁸ But the principal disagreement on this subject concerns "results," and in that sense it is the

¹⁵ *id.*

¹⁶ *id.*

¹⁷ Matthew G. Springer, Keke Liu, and James W. Guthrie, "The impact of school finance litigation on resource distribution: a comparison of court-mandated equity and adequacy reforms," 17 *Education Economics* 421, 440 (2009). They were unable, however, to conclude whether this increased spending "benefited students requiring additional resources or found all districts spending more." The chief purpose of their paper was to determine whether the legal rationale behind the court's decision—"equity" or "adequacy"—led to divergent outcomes. They concluded that it did not, further substantiating my own claim that *how* these cases are decided, although undoubtedly important to lawyers and legal scholars, is not as important as the fact that they *are* decided. In other words, the justices are voting for their policy preferences; the opinion itself, although perhaps useful (as in *Rose*) for opening a "dialogue," is primarily a justification for the policy preference that the court has voted to espouse.

¹⁸ Recall that, in the chapter about *DeRolph*, one Ohio justice actually used his concurring opinion to take potshots at outgoing Ohio Governor George Voinovich ("Let George do it! Well, George hasn't done it"). Michael Rebell takes the position in *Courts and Kids* that the early termination of court jurisdiction in these cases is unwise; I will use recent developments in the *Abbott v. Burke* litigation in New Jersey to offer a gentle critique of this position.

extension of a broader educational debate about “inputs” and “outputs” that has been ongoing at least since the publication of the Coleman Report in 1966. Opponents of increased school spending that has occurred without evidence of improved student results (i.e., “accountability”) were given new legs with the publication of the 1983 Reagan administration-commissioned education report *A Nation at Risk*. The report’s authors argued that “declining” results on various standardized tests could be remedied with “competitive, market-sensitive, and performance-based” teaching and an increasing reliance on rigorous regular testing to determine whether “standards and expectations” were being met.¹⁹ This has been the position taken by Eric Hanushek, an economist and Senior Fellow at the Hoover Institute who has become the leading opponent of judicial involvement in school finance decisions.

Over the course of dozens of articles and several books, Hanushek reaffirmed his central hypothesis: School finance litigation has not improved student achievement. As he writes in *Courting Failure* (2006), “the simplest summary is that *no* currently available evidence shows that past judicial actions about school finance—either related to equity or to adequacy—have had

¹⁹ The entire report is available online: <http://www2.ed.gov/pubs/NatAtRisk/index.html>. The gist of the report appears to be that public education should be run, as nearly as possible, like a for-profit private business. “Salary, promotion, tenure, and retention decisions should be tied to an effective evaluation system that includes peer review so that superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated.” “Attendance policies with clear incentives and sanctions should be used to reduce the amount of time lost through student absenteeism and tardiness.” Incentives, performance reviews, and the like would counter “the mediocre educational performance that exists today. As it stands, we have allowed this to happen to ourselves. We have even squandered the gains in student achievement made in the wake of the Sputnik challenge. Moreover, we have dismantled essential support systems which helped make those gains possible. We have, in effect, been committing an act of unthinking, unilateral educational disarmament.” This was, in short, a rather bizarre document, but rhetoric of the sort quoted in the preceding passage helped inaugurate a new and even more feverish rush to “reform” America’s “failing” schools. The impact of such apocalyptic language—“failure,” “declension,” “wholesale collapse,” “mediocre educational performance”—is discussed in considerable detail in David C. Berliner and Bruce J. Biddle, *The Manufactured Crisis* (New York: Basic Books, 1996). Berliner and Biddle conclude that most of this is just political gamesmanship, that the halcyon past to which *A Nation at Risk* points was the pre-*Brown* era where few African-Americans and poor whites even reached high school to take their standardized tests, and that “failure” is an amorphous term that can be easily manipulated by those who wish to claim that something/someone is “failing.” See n. 5, regarding the similar use of “success.”

a beneficial effect on student performance.”²⁰ This is a relatively easy argument to make, as most research dating back to the Coleman Report (discussed in Chapter Three) has concluded that the correlation between per-student expenditures and student performance was very weak. From this, Hanushek has produced a large body of writing—one often cited in briefs opposing plaintiffs in this litigation, or by recalcitrant governors such as Chris Christie—built on the following syllogism:

Major Premise: *There is no link between school spending and student performance.*²¹

Minor Premise: *School finance litigation is concerned with, and sometimes leads to, an increase in school spending.*

Conclusion: *Since all school finance litigation can do, at best, is increase school spending, there can be no link between student performance and school finance litigation.*

From this follows a host of specific criticisms. There is no clear definition of what an “adequate” education is. No one knows how schools spend all of their money. Serious test preparation and market-based teacher compensation—the key recommendations in *A Nation at Risk*—are the only way to improve the schools (again, “accountability”—counting what Hanushek (and others) believe can be counted). All of that, while interesting, nonetheless leads

²⁰ Eric A. Hanushek (ed.), *Courting Failure: How School Finance Lawsuits Exploit Judges’ Good Intentions and Harm Our Children* (Palo Alto: Hoover Institute, 2006), pp. xxiii-xxiv.

²¹ Even this hoary truism has been challenged by many researchers. See, *inter alia*, Bruce Baker, *Revisiting that Age-Old Question: Does Money Matter in Education?* (Albert Shanker Institute, 2012): “On average, aggregate measures of per-pupil spending are positively associated with improved or higher student outcomes. In some studies, the size of this effect is larger than in others and, in some cases, additional funding appears to matter more for some students than others. Clearly, there are other factors that may moderate the influence of funding on student outcomes, such as how that money is spent – in other words, money must be spent wisely to yield benefits. But, on balance, in direct tests of the relationship between financial resources and student outcomes, money matters. Schooling resources which cost money, including class size reduction or higher teacher salaries, are also positively associated with student outcomes. Again, in some cases, those effects are larger than others and there is also variation by student population and other contextual variables. On the whole, however, the things that cost money benefit students, and there is scarce evidence that there are more cost-effective alternatives.” Accessed online at http://www.shankerinstitute.org/images/doesmoneymatter_final.pdf.

one down a blind alley. In large part, this is because such arguments overlook research done in the past three decades regarding how increased school funding could be properly allocated in ways that lead to an improvement of school performance.²² Furthermore, this could never be a judicial function, since, short of writing some general guidelines as in the *Rose* decision, there is really no way for judges to engage in such activity. The courts can provide a mandate; it is left to the legislators, and, perhaps even more importantly, the administrative agencies, to settle the particulars.²³

“Settling the particulars” has proved extremely difficult in New Jersey, where the lengthy dialogue over the terms of the *Abbott v. Burke* (1985) litigation has outlasted the efforts of numerous governors, such as Democrat Jim Florio (1990-1994) and Christine Todd Whitman (1994-2001), to dictate the terms of this engagement. The first *Abbott v. Burke* decision occurred as a result of a lawsuit brought by Paul Tractenberg, the director of Rutgers-Newark Law School’s Education Law Center (“ELC”) and a man who has managed to have a significant scholarly career while also compiling an astonishing record of success at litigating and re-litigating school finance cases in New Jersey.²⁴ In *Abbott I*, Tractenberg and the ELC challenged

²² As summarized in “Improving the Productivity of Schools,” in Helen F. Ladd and Janet S. Hansen, *Making Money Matter* (National Research Council, 1999), pp. 134-162. Many of Hanushek’s suggestions for evaluating performance can be operationalized and enhanced through the appropriate allocation of funds. According to Ladd and Hansen, it is not, as Hanushek might argue, simply a matter of spending money correctly; sometimes it is a matter of having more money to spend, especially in those instances where schools do not have enough money to keep the heat on in the gymnasium, repair the plumbing in the bathrooms, order updated textbooks, or purchase new (or any) computers for the classroom, etc.

²³ As noted in the previous chapter, state supreme court attempts to shape the parameters of the debate over funding—such as when, in *DeRolph III*, the majority presented a funding structure that, having been based on erroneous revenue projections—have typically proved impracticable. Judge Albert Rosenblatt, who voted with the majority in the *Campaign for Fiscal Equity* decision in New York, remarked on this subject as follows: “In *CFE* in theory we could have said, ‘Here is what we think we need, x billions of dollars, and if you do not come up with x dollars in x months, here’s what’s going to happen to you.’ There is no way we would do that in our court—almost inconceivable—because it would have shown an arrogance that the New York Court of Appeals would not use. We were saying, in effect, to the governor, the legislature, ‘This is your job; do it. We have confidence you’re going to do it’” (quoted in Rebell, *Courts and Kids* appendix, at p. 120).

²⁴ *Abbott v. Burke*, 100 New Jersey 269, 495 A.2d 376 (1985).

the constitutionality of the Public School Education Act (“PSEA”), alleging that it did not properly allocate funding in a way that would achieve *equalized* results between urban and suburban districts. This was a bold claim, but one that the ELC thought was justified because children in cities like Newark “have demonstrably greater educational needs, as evidenced by large numbers in need of compensatory and bi-lingual education, and by low test scores, high dropout rates, and low college attendance...[and] are deprived of equal educational opportunity under New Jersey’s school finance scheme.”²⁵ Justice Alan Handler, writing for the majority in *Abbott I* and sympathetic to the ELC’s argument, remanded the case to an administrative tribunal created by the court in order to develop “a record sufficient to guide the adjudication of the constitutional issues on any future appeal.”²⁶ This was a reasonable decision, but the process by which it was implemented (18 more *Abbott* decisions by the New Jersey Supreme Court and eight governors came and went before the court, in *Abbott XX* (2009)²⁷, held that school reform legislation passed by Governor Jon Corzine was constitutional) was characterized as “a nightmare of legalism” by its leading chronicler.²⁸

Five months after the *Abbott XX* decision was handed down, Corzine lost his bid for reelection to Chris Christie. Christie, a skilled appellate litigator, had run on a platform of “fiscal responsibility” and immediately took aim at Corzine’s School Funding Reform Act (“SFRA”) of 2008. The act, which had been designed precisely with the years of *Abbott* litigation in mind, allocated 60 percent of state aid to 31 of its 588 school districts.²⁹ In spite of this fact, it was not

²⁵ ELC complaint in *Abbott v. Burke I*, quoted in Paris, *Framing Equal Opportunity*, p. 84.

²⁶ *Abbott* at 383.

²⁷ And even then, “only to the extent that the record permitted its review.” *Abbott v. Burke XX*, 199 New Jersey 140 (2009).

²⁸ Michael Paris, *Framing Equal Opportunity*, p. 153.

²⁹ Bill Wichert, “Chris Christie claims former *Abbott* districts get 70 percent of the state aid” in *The Star-Ledger* (12-01-2011). This unevenness was, of course, the ELC’s *goal* in pursuing the *Abbott* litigation. Throughout his career, Tractenberg had been uncomfortable with the mere “wealth neutrality” advocated by men like John Coons;

an especially high-salience issue in the minds of New Jersey citizens; polling done by researchers at Fairleigh Dickinson University showed that most people in the state hadn't heard of "*Abbott* districts" at all.³⁰ When informed about what these districts were, a majority of respondents expressed approval of them.³¹ Christie was determined to change that, and took a strong public stand against the funding priorities imposed by the SFRA, refusing to submit a budget in 2010 that fully subsidized the *Abbott* districts. The result was a constitutional showdown, with the New Jersey Supreme Court holding in *Abbott v. Burke XXI* that Christie's decision to cease providing the recommended levels of supplemental funding for the *Abbott* districts would not be tolerated:

The State argues that the Court must defer to the Legislature because the legislative authority over appropriations is plenary pursuant to the Appropriations Clause of the Constitution. See N.J. Const. art. VIII, § 2, ¶ 2. Although it is true that past decisions of this Court have recognized the Legislature's authority to work a modification of other statutes through the adoption of an annual appropriations act, a different question is presented here. The State seeks, through the legislative power over appropriations, to diminish the *Abbott* districts' pupils' right to funding required for their receipt of a thorough and efficient education after representing to this Court that it would not do so in order to achieve a release from the parity remedy requirement. In such circumstances, the State may not use the appropriations power as a shield to its responsibilities.³²

"that theory...did not come close to saying and doing what he wanted law to say and do...[and] he set out on his own to find an alternative legal theory" (Paris at 155-156). Michael Paris seems somewhat critical of Tractenberg's work, viewing it as leading to the creation of a large body of conflicting and convoluted New Jersey jurisprudence, but—as I have made clear in prior chapters—I am sympathetic to any and all efforts to articulate new legal doctrines that serve to implement useful policy objectives (the law, after all, is whatever courts say it is, and if they are willing to accept one's novel argument, so be it).

³⁰ Only 12% of respondents stated that they had heard a "great deal" about the decision and 57% had heard nothing at all about them. See "Voters Unfamiliar with *Abbott* and *Mount Laurel*," <http://publicmind.fdu.edu/nj0806/>.

³¹ *id.* According to Peter Woolley, the political scientist who directed the poll: "Voters don't know the details but they agree with the principles. However, those who approve of the decisions are also more likely than those who disapprove to have heard little or nothing about them."

³² *Abbott v. Burke XXI*, M-1293-09 (May 2011). In her dissenting opinion, Justice Helen Hoens wrote that the majority opinion "treads on the constitutional prerogatives of the Legislature and the executive branch."

Christie, like several other Republican governors elected between 2008 and 2010³³, sought to enforce fiscal responsibility by refusing to increase taxes or raise additional revenue in order to meet what he viewed as imprudent spending obligations. When the New Jersey Supreme Court handed down its opinion on May 24, 2011, Christie reacted immediately and forcefully. In a public statement delivered the day of *Abbott XXI*, he articulated a more limited vision of the judiciary's role in school finance litigation, one that had been accepted by supreme courts in states such as Pennsylvania and Illinois:

The Court should not be dictating how taxpayer dollars are spent and prioritizing certain programs over others. The Supreme Court is not the Legislature; it should not dictate policy, it should not be in the business of discussing specific taxes to be raised and it should not have any business deciding how tax dollars are spent.³⁴

He stopped short, however, of threatening to completely disregard the court's holding. In the process, though, he presented a compelling statement of his own beliefs, a statement similar to those being made by his fellow Republican governors in Wisconsin and Pennsylvania:

However, as Governor of New Jersey, I realize that regardless of my personal beliefs, I must comply with the New Jersey Constitution as interpreted by the New Jersey Supreme Court. In February, I submitted my budget to the Legislature for review and consideration. That is my constitutional obligation. Now the legislature has until June 30th to fulfill its constitutional obligation to pass a final budget. My principles remain the same. New Jersey has some of the highest taxes in America. New Jerseyans are already incredibly overtaxed. Therefore, as I have repeatedly stated, I do not believe raising taxes is the answer. That has not changed.³⁵

The danger here, however, was not that Christie would refuse to comply. In fact, owing to a surprising surplus of actual revenues vis-à-vis projected revenues, he grudgingly conceded two

³³ e.g., Scott Walker (R-WI) and Tom Corbett (R-PA) both engaged in spirited battles over the budgets in their states, slashing funding in various critical areas. In these cases, as well in Christie's case, the argument was that "the state can't spend money that it doesn't have."

³⁴ Available at the official Governor Chris Christie YouTube page: <http://www.youtube.com/watch?v=9c-jQ25JID8>.

³⁵ *id.*

days later, while remaining unclear about exactly *how* the nearly \$1 billion in funding would be allocated.³⁶ What mattered was that Christie, one of the savviest communicators among the new generation of Republican politicians, had made a low-salience political issue—recall the polling done at Fairleigh Dickinson University—into a significant talking point. He had, at least as far as high-level politicians go, a strong grasp of the nuances of school finance litigation, and rarely missed an opportunity to draw unfavorable attention to the unelected New Jersey Supreme Court:

Abbott v. Burke is an example of exactly what I was talking about in the campaign of 2009 about why we need to change the supreme court. We do not any longer need a supreme court where those people, who are not elected by anyone, are making laws from the bench. And that's what they're doing: they're directing how *your* money is meant to be spent. Let's go from 1988 forward, the last twenty years. The taxpayers of New Jersey have sent \$68.2 billion dollars to the *Abbott* districts in this period, with funding going up each year and enrollment in those districts going down. And do you know what the judges decided last week? The problem is we're not spending *enough* money! The question here is: can the court order us, order the state of New Jersey, to raise taxes? Now, I don't have a contingency plan for this, because I can't even imagine this would ever come to pass.³⁷

If nothing else, that is powerful rhetoric. The behavior of the “imperial judiciary” is a secondary concern, folded into Christie’s larger message about drawing a line in the sand regarding taxation, and it should concern school finance reform advocates that their work can so easily be incorporated into that broader critique. Although the public remained generally supportive of the New Jersey Supreme Court during this conflict, the possibility that school finance litigation can be bootstrapped onto the same “small government” platforms that elected many Republicans in 2010 suggests that justices ought to proceed with caution when engaging with executives like

³⁶ “N.J. Governor Christie Wisely heeds Supreme Court order on *Abbott* district funding,” *The Times of Trenton* (05-26-2011).

³⁷ Statement at a town hall meeting in Hammonton, New Jersey (03-30-2011) available on Chris Christie’s YouTube page: <http://www.youtube.com/watch?v=SMO7K63d7-o&feature=relmfu>.

Christie.³⁸ Christie, while versed in the *Abbott* litigation, has little regard for the specifics of what the justices intended; rather, he appears to be using loaded terms like “failing schools” and “wasteful spending” to justify his program of across-the-board budget cuts.³⁹

This is all well and good, and may indeed fail to resonate with voters, but the success of Proposition 13 in California offers a notable counterexample. There were, of course, a host of other reasons for the success of that measure, such as the rapid and disruptive modernization of property tax assessments throughout California, but anti-tax activists joined those complaints with a critique of the 1971 *Serrano* decision to pass a measure that severely limited the ability of municipalities to provide essential services.⁴⁰ At the very least, justices should bear this sort of reaction in mind when deciding such cases and overseeing the implementation of their mandates, even if they believe themselves heavily insulated from public opinion. Joyce Elliot, a congresswoman who had participated in fashioning a legislative remedy after school finance litigation in Arkansas, stressed the importance of proactively and constructively involving the public in this process:

³⁸ Patrick Murray, “Christie v. Abbott” in *PolitickerNJ* (05-24-2011): “From a public opinion point of view, the decision will go largely unnoticed. Part of the reason is that most New Jerseyans pay little attention to the court. Part of it is that, over the past 20 years, we have become used to the idea that certain (i.e. Abbott) school districts receive extra state aid. My own research into public attitudes toward school funding in New Jersey indicates that the public thinks there is an element of fairness in giving extra resources to those that need it most. Ultimately, Christie would have had to argue that the court was taking education funding away from suburban districts and undermining the promise of future property tax relief. All of that, however, would have been a heavy lift in the court of public opinion. He would have had to do it without appearing to attack the court. Why? Most New Jerseyans have a basically positive view of the court. It’s unlike opinion of the legislature, where most of the public concurs with Christie’s ‘do-nothing’ moniker.” Murray is right, I believe, but the possibility nonetheless exists that a skilled politician such as Chris Christie, given sufficient time, may be able to successfully link the “do-nothing” legislature and the “imperial judiciary” in the minds of a significant number of voters.

³⁹ David G. Sciarra, “5 myths about Gov. Chris Christie’s ed reform in New Jersey,” *The Washington Post* (09-30-2011): “The governor offers no reason why the SFRA doesn’t provide adequate and equitable funding for all students. And Christie conveniently ignores the fact that when compared to most other states, New Jersey stands out as a model for reform in public school funding.” Christie also fails to note that New Jersey is one of the few states competitive with other First World nations on standardized reading and mathematics tests. See n. 5, *supra*.

⁴⁰ Jeffrey Chapman, *Proposition 13: Some Unintended Consequences* (Public Policy Institute, 2000). Local school districts, for instance, have lost the ability to raise revenues beyond a “ceiling” set by Proposition 13, and many have become heavily reliant on state aid, which has varied significantly from year to year due to frequent battles over the budget in Sacramento.

In regard to remedies, I would do two things. First, a legislative remedy should involve a great deal of engagement with the general public. One of the things I've always wanted us to do as legislators and leaders of a community is to go out and have face-to-face discussions with the people to help them why this is important. We have to come up with a rational way to engage people rather than just criticize them for not being supportive. It's going to have to be done or we are not going to have the will, the support, or the authority to do what we need to continue to support our schools.⁴¹

Elliot's advice is worthwhile, but, as the next section makes clear, not all public involvement is created equal, nor is all of it "constructive."

5.2 ALABAMA 2004: THE DEFEAT OF AMENDMENT 2

Recall Mississippi Governor James Vardaman's response, offered early in the 20th century, to what he viewed as wasteful education spending:

Remove the Constitutional hindrance and the remedy will be discovered. Money spent today for the maintenance of the public schools for Negroes is robbery of the white man, and a waste upon the negro. You take it from the toiling white men and women, you rob the white child of the advantages it would afford him, and you spend it upon the Negro in an effort to make of the negro what God Almighty never intended should be made, and which men cannot accomplish.⁴²

Vardaman's attempt to limit expenditures on African-American schools that came from Mississippi's school fund was echoed throughout the South, with conservative Democrats in other states arguing that such funds should be expended according to the "public welfare" (i.e., the discretion of the local school board) rather than by population. Such a shift provided a basis, in turn, for "expend[ing] school funds for the benefit of the white people...expend[ing] every

⁴¹ Quoted in *Courts and Kids*, p. 122.

⁴² "Message of James K. Vardaman, Governor of Mississippi, to the House and Senate of Mississippi, Thursday January 9, 1910" quoted in Horace Mann Bond, *The Education of the Negro in the American Social Order* (Octagon: New York, 2d ed. 1966), p. 103. For more on school funding in the "Jim Crow" South, see Chapter 3, Section 1.

cent they are willing to tax themselves for the benefit of their own children.”⁴³ It was in this spirit that delegates at the 1901 Alabama Constitutional Convention included the following language in their state’s education clause: “Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”⁴⁴ This passage was amended in the wake of *Brown v. Board of Education* by a state legislature concerned with the broader implications of that decision. Amendment 111 clarified Section 256, stating unequivocally that “*nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense*, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.”⁴⁵

Both the original language in the education clause and the text of Amendment 111 remain part of Alabama’s state constitution, an extraordinarily long and convoluted document that contains numerous outdated sections.⁴⁶ For example, until the passage in 2000 of Amendment 667, Section 102 forbade “any marriage between any white person and a negro, or descendant of

⁴³ 1 Proceedings of Virginia Constitutional Convention 1194-1204, quoted in Louis Harlan, *Separate and Unequal: Public School Campaigns and Racism in the Southern Seaboard States 1901-1915* (Chapel Hill, 1958), p. 142.

⁴⁴ Alabama Constitution of 1901, Article XIV, § 256. The clause also provided that “The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships.” As both Harlan and Horace Mann Bond note, “equal” duration in school terms often varied by as many as two months, and the public school fund, once allocated by population, was spent in whatever way the local board saw fit. The Constitutional Convention of 1901 contained 155 delegates, all of whom were white and only a few of whom were Republicans. In the presidential address to the delegates, John Knox articulated the spirit in which the state’s governing document would be drafted: “There is a difference...between the uneducated white man and the ignorant negro. There is in the white man an inherited capacity for government, which is wholly wanting in the negro.” 1 *Official Proceedings of the Constitutional Convention of the State of Alabama of 1901* 12.

⁴⁵ Alabama Constitutional Amendment 111. The legislature also passed a resolution, with only four votes in opposition, declaring *Brown* to be “null, void, and of no effect.”

⁴⁶ There have been numerous attempts to condense the Alabama Constitution of 1901 into a more user-friendly document. The various problems with the document were the subject of a Fall 2001 issue of the *Alabama Law Review* that was produced in recognition of the constitution’s centennial.

a negro.”⁴⁷ Even prior to its annulment, of course, that provision had been rendered unenforceable by the Supreme Court’s decision in *Loving v. Virginia* (1967).⁴⁸ But its presence in Alabama’s governing document, however difficult to find, proved sufficiently obnoxious that it was at last removed by popular vote as part of a general period of constitutional reform that also witnessed the removal of Article VIII, the 1901 constitution’s detailed discussion of various race-based voting restrictions, by Amendment 579.⁴⁹

Although a wholesale revamping was urged by many activists (with some going so far as to call for a new constitutional convention), by 2002 only the gradual excising of select segregation-era provisions had been undertaken with regard to a document that, in the words of one constitutional scholar, “was and still is impossible to separate from race relations...[and] cannot be understood without an understanding of the politics of race.”⁵⁰ With the backing of the state chapter of the NAACP as well as the Alabama Legislative Black Caucus, Amendment 2 was added to the ballot in 2004 in the hopes of achieving yet another piecemeal constitutional reform. It was simply worded: “Proposing an amendment to the Constitution of Alabama of 1901, to repeal portions of Section 256 and Amendment 111 relating to separation of schools by race and repeal portions of Amendment 111 concerning constitutional construction against the right to education, and to repeal Section 259, Amendment 90, and Amendment 109 relating to the poll tax.”⁵¹

⁴⁷ Alabama Constitution, § 102: “Miscegenation laws. The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro. This section has been annulled by Amendment 667.”

⁴⁸ *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional race-based restrictions on marriage).

⁴⁹ These measures were first advanced by the Alabama Citizens for Constitutional Reform (“ACCR”). See ACCR, “Who We Are,” at <http://www.constitutionalreform.org/whoweare.shtml>.

⁵⁰ William H. Stewart, *The Alabama State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1994), p. 5.

⁵¹ Quoted in “2004 Referendum General Election Results, Alabama,” at <http://www.uselectionatlas.org/RESULTS/state.php?fips=1&year=2004&f=0&off=51&elect=0>.

Amendment 111, in its limited modern context, did appear to offer significant protection for the state government in the event of a school finance lawsuit. As Figure 1 indicates, by 2011 only a handful of state supreme courts had held that education was a fundamental right in the course of declaring the system of school finance in their state to be unconstitutional. But the likelihood of this occurring in Alabama, already minimal, was further reduced by the fact that the plain text of the constitution explicitly prohibited such an outcome.

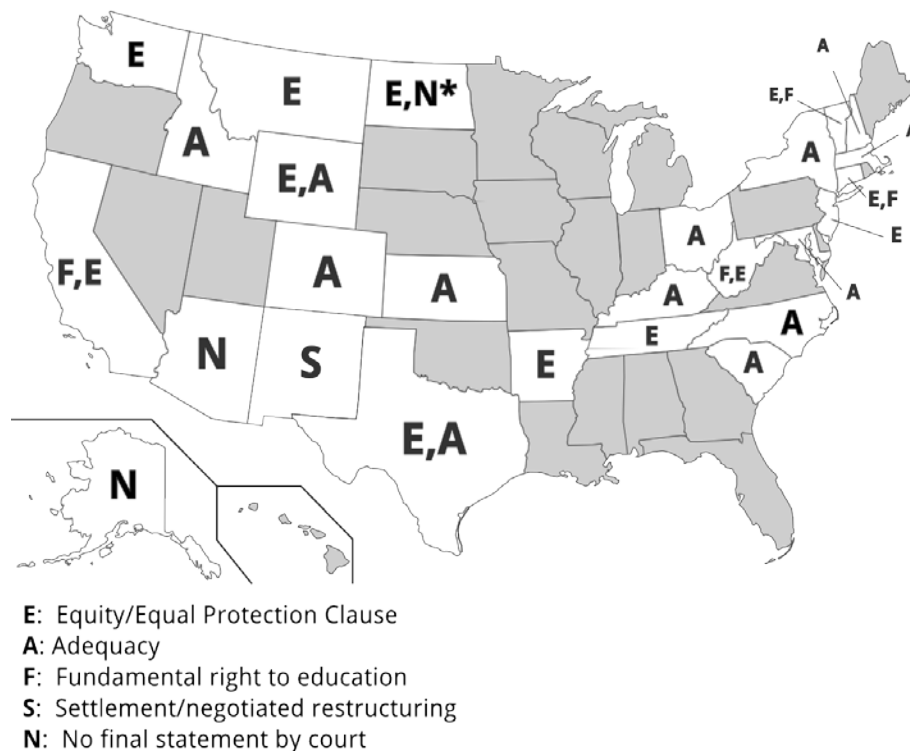


Figure 1 - Basis of Plaintiff Liability Victory⁵²

Only California, Connecticut, West Virginia, and Vermont (in that order) had reached such a result; the drafters of Florida’s new education article, which appeared to indicate that education was a “fundamental right,” had noted in an accompanying commentary that this provision merely

⁵² Source: Westlaw (West Publishing).

made education a “fundamental value” of the state.⁵³ Of course, the Deep South has proven unusually resistant to school finance litigation, as Figure 2 makes clear.⁵⁴

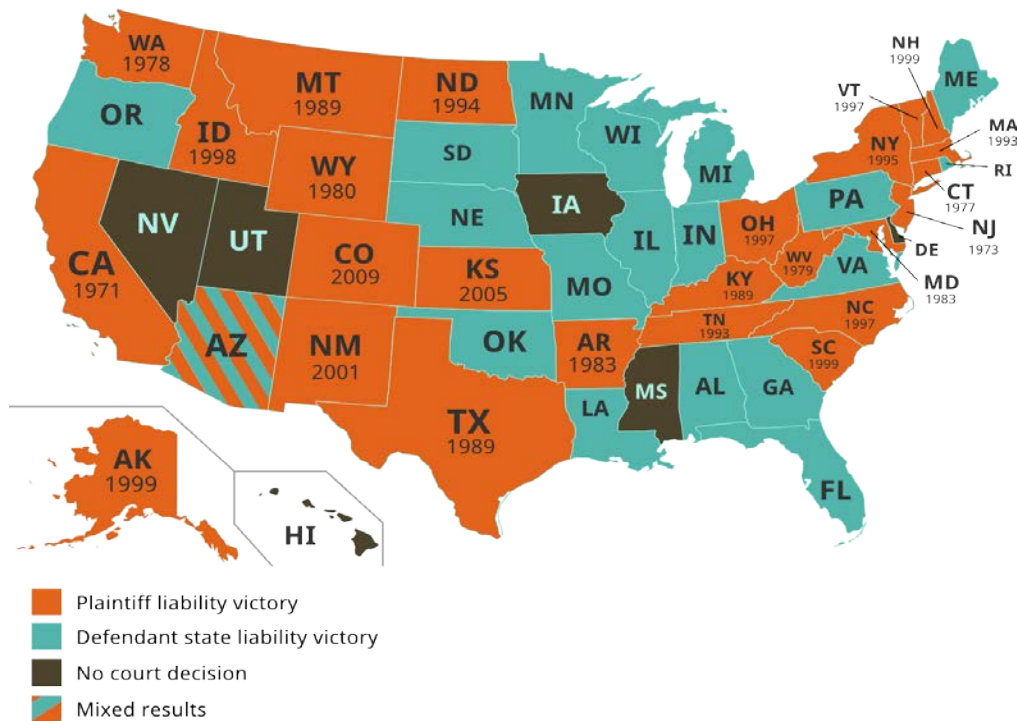


Figure 2 - School Finance Litigation Outcomes by State⁵⁵

Alabama, Mississippi, Georgia, and Louisiana had always lagged behind most other states in terms of education spending, and as of 2010 were also lagging behind most First World nations

⁵³ See Chapter 3, Section 3, subsection 2 for a fuller discussion of the re-drafting of the education article in Florida’s constitution.

⁵⁴ “Plaintiff liability victory” in Figure 2 indicates that a given state supreme court has declared its system of school funding to be unconstitutional; “defendant state liability victory” indicates that the state has succeeded in defending its method of school funding. “No court decision” does not indicate (with the exception of Hawaii and Iowa, where the former has a unitary state school system and the latter has no education clause in its state constitution) that no lawsuits have been filed, only that none have yet reached that state’s supreme court.

⁵⁵ Source: Westlaw (West Publishing). The asterisk beside North Dakota indicates that, although a majority of that court found that state’s method of funding its schools to be unconstitutional according to an “equity” theory, the result was non-binding because it was not made by a “super-majority” of justices. Additionally, the results of school funding litigation in Arizona, pursued both in state and federal courts, have been inconclusive, but the past decade has seen a number of attempts by the state legislature, prodded by the state’s supreme court, at developing a new method of funding the state’s public schools.

in education performance.⁵⁶ Yet the mere prospect that Amendment 2's bland wording might lead to an adverse court hearing, which in turn might lead to an increase in taxes levied upon Alabama citizens, sufficed to "trigger an intense reaction from groups claiming to represent conservative Christians...[who began] to crank up Web sites and issue press releases, warning of higher taxes, anti-religious actions, or worse."⁵⁷ John Giles, president of the Alabama chapter of the Christian Coalition, opposed Amendment 2 not because it would remove the language regarding segregated schools from the constitution (he supported doing so), but because it would repeal Amendment 111. Giles argued that "the Christian Coalition favors keeping education as a gift from the state rather than making it a constitutional right."⁵⁸ Joining with Giles in opposition to Amendment 2 was former Alabama Chief Justice Roy Moore, who believed that "removing the 1956 provision from the constitution could lead to judges ruling that education is a constitutional right and then ordering the state to spend more on public schools."⁵⁹

This seemed an unlikely outcome given both the reception that school finance litigation had received in the Deep South as well as the fact that the Alabama Supreme Court was in 2004 (and still is, as of 2012) composed of conservative Republican justices selected in partisan

⁵⁶ Alabama, Mississippi, and Louisiana ranked ahead of only twelve countries (among them Kyrgyzstan and Azerbaijan) and behind Turkey and Uruguay, in the most recent comprehensive study of US educational performance, published in *Education Next*. Georgia came in near bottom of the list as well, only three slots above Turkey. See "Miseducation Nation," an interactive data presentation at *The Atlantic Online*: <http://www.theatlantic.com/national/archive/2010/11/your-child-left-behind/66069/>.

⁵⁷ H. Bailey Thomson, *The Struggle in Alabama for Constitutional Reform* (ACCR Working Papers, 2004), p. 29.

⁵⁸ Phillip Rawls, "Black Caucus Says it Will Filibuster Any New Version of Amendment 2," *The TimesDaily of Florence* (AL), 12-17-2004. In a statement, the Alabama Christian Coalition, while reaffirming that it was a "multiracial organization committed to Christian principles of social justice," provided scriptural justification for its claim that education was a gift rather than a right, quoting 1 Corinthians 4:7: "*For what gives you the right to make such a judgment? What do you have that God hasn't given you? And if everything you have is from God, why boast as though it were not a gift?*" (New Living Translation, emphasis mine).

⁵⁹ *id.* Moore is perhaps best known for having been relieved of his duties as Chief Justice by the Alabama Court of the Judiciary after repeatedly refusing, in spite of direct orders from a federal judge, to remove a monument of the Ten Commandments from the Alabama Judicial Building. See Jannell McGrew, "Moore Suspended" in *The Montgomery Advertiser*, 08-23-2003.

elections in a state that typically votes Republican.⁶⁰ Nevertheless, Giles was convinced that “these activists on the bench know no bounds...[and their decisions are] a trial lawyer’s dream.” He led a committed effort to resist the amendment’s passage,⁶¹ in the process “employing an argument that was ridiculed by most of the state’s newspapers and by legions of legal experts...[in which he claimed] that a right to public education would then open a door for ‘rogue’ federal judges to order the state to raise taxes to pay for improvements to its public school.”⁶² This was an “argument [that] played to Alabama’s primal fear of federal control.”⁶³

By itself, hostility to school funding litigation had proved incapable of passing Proposition 13 or removing an incumbent justice in a hotly-contested Ohio Supreme Court election. But here, men like Giles and Moore connected concerns over such litigation with a generalized and admittedly rather paranoid fear regarding the loss of local control. When voters went to the polls, the breakdown by county served to express an eerie, unspoken truth.⁶⁴

⁶⁰ And never mind, furthermore, that in *Ex Parte James*, 713 So.2d 869 (Alabama 1997), the Alabama Supreme Court had concluded a long-running series of education lawsuits by holding that the legislature, rather than the courts, bears the primary responsibility for devising a constitutionally valid public school system. The court had, if anything, become even more conservative during the intervening years. Moreover, the notion that the federal courts would intervene as a result of school funding litigation seems even less likely, given that *San Antonio v. Rodriguez* remains a well-settled precedent.

⁶¹ Rawls, n. 54, *supra*.

⁶² Manuel Roig-Franzia, “Alabama Vote Opens Old Racial Wounds,” *The Washington Post* (12-28-2004).

⁶³ *id.*

⁶⁴ Recall Charles Sumner’s critique of Southern attitudes toward education from Chapter 2, Section 3: “The contrast between the rebel States and the loyal States appeared early. It was conspicuous in two Colonies, each of which exercised a peculiar influence. Massachusetts began her existence with a system of free schools...[and] at the same time Virginia set herself openly against free schools. The papers of the day...show how the original spirit of Virginia...still animates these states. A motion to print two hundred copies of the report of the State Superintendent of Public Education was promptly voted down in the Senate of Louisiana, while a Senator... ‘denounced the public education scheme as an unmitigated oppression, an electioneering device, an imposition...’” (emphasis mine).

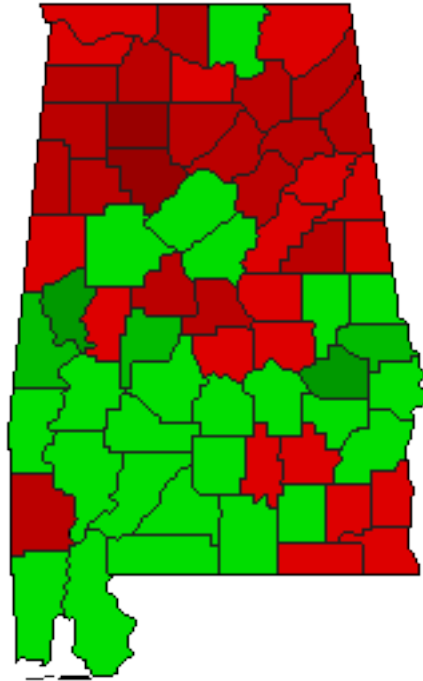


Figure 3 - Amendment 2, 2004 Vote By County⁶⁵

Here the “no” votes, represented by shades ranging from bright red (> 50% “no”) to dark red (> 70%), and the “yes” votes, represented by shades ranging from bright green (> 50% “yes”) to dark green (> 70% “yes), correspond rather neatly with the racial divisions in those counties. In almost every county in Alabama with a majority African-American population in 2005, Amendment 2 passed by a substantial margin.

⁶⁵ Source: “2004 Referendum General Election Results, Alabama,” at <http://www.uselectionatlas.org/RESULTS/state.php?fips=1&year=2004&f=0&off=51&elect=0>.

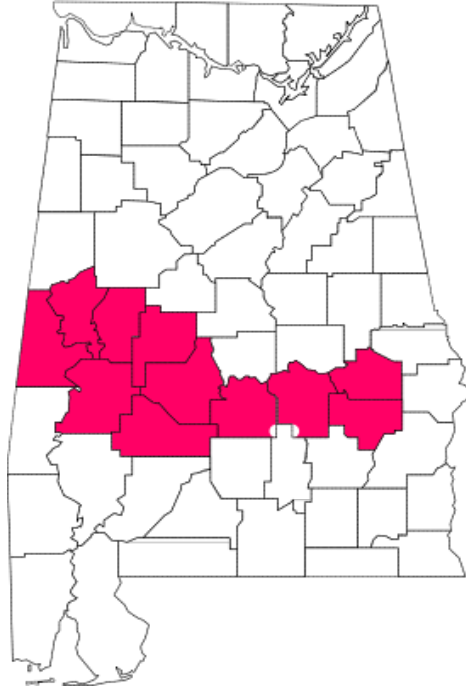


Figure 4 - African-American Majority Counties, 2004-2005⁶⁶

The final vote, with 690,376 opposed and 688,530 in favor, was close enough to trigger a mandatory recount; however, the recount merely confirmed the original result.⁶⁷ State representative Alvin Holmes, a member of the Alabama Legislative Black Caucus, claimed that the defeat of Amendment 2 was the work “of an unholy axis of the Christian right, racists, and right-wing neo-Nazis...who used the tax issue so they wouldn’t appear openly racist.”⁶⁸ Tommy Woods, a former Alabama school administrator, offered a slightly more measured assessment of the outcome: “There are people here who are still fighting the Civil War...[and] holding on to things that are long since past, almost like a religion.”⁶⁹

⁶⁶ Source: US Census data.

⁶⁷ “2004 Referendum General Election Results, Alabama,” at <http://www.uselectionatlas.org/RESULTS/state.php?fips=1&year=2004&f=0&off=51&elect=0>.

⁶⁸ Phillip Rawls, “Black Caucus Says it Will Filibuster Any New Version of Amendment 2,” *The TimesDaily of Florence* (AL), 12-17-2004.

⁶⁹ Manuel Roig-Franzia, “Alabama Vote Opens Old Racial Wounds,” *The Washington Post* (12-28-2004).

Woods is not entirely correct; in a variety of respects, Alabama and the other states of the Deep South have come a long way since 1865.⁷⁰ But with regard to education finance, they have not come very far at all. These states' school systems were the most poorly funded in America in 1900, when W.E.B. DuBois edited and compiled his report on African-American public education, and they remain among the worst today.⁷¹ They are competitive with schools in countries like Kyrgyzstan and Azerbaijan, but are significantly outperformed by other former Soviet republics such as Latvia and Lithuania, as well as nearly every other state and First World country.⁷² Furthermore, African-American students, who appear to have the most to gain from increases in school funding, have had especially negative outcomes in Alabama's schools: "73 percent of black eighth-graders rated below basic competency in math, compared with 32 percent of white eighth-graders."⁷³ Although it is unclear if the passage of Amendment 2 would have changed any of this, its failure to pass evinces a clear desire on the part of many to resist such changes.

⁷⁰ See, for example, Edward L. Ayers, *The Promise of the New South* (Oxford, 1992). One notable respect in which the South has improved since 1865 is the achievement of near-universal literacy.

⁷¹ W.E.B. DuBois (ed.), *The Negro Common School* (1901), pp. 70-75. Accessed at <http://books.google.com/books/reader?id=iFoOAQAIAAJ&printsec=frontcover&output=reader&pg=GBS.PA75>.

⁷² Both of which had, as of 1970, higher overall literacy rates (100%) than either Alabama or Mississippi, as well as top-down, unitary systems of public education that were installed by the Soviet government. See "Education in Azerbaijan," Azerbaijan Ministry of Education, <http://portal.edu.az/English/Pages/default.aspx>.

⁷³ Roig-Franzia, *supra*. Bruce Baker, summarizing recent developments in education research, noted that increases in education spending that have subsidized the cost of longer school days and smaller class sizes appear to have had a demonstrable, disproportionate effect on African-American students: "Furthermore, on average, overall student achievement on the National Assessment of Educational Progress (NAEP) masks the fact that scores for subgroups, such as African- American students, have actually improved quite dramatically over time, and achievement gaps have narrowed." *Revisiting the Age-Old Question: Does Money Matter in Education?* at p. 15. This has, as Sean Reardon noted in his recent working paper "The Widening Education Gap between the Rich and the Poor," led to a decrease-in the black-white test gap, even as the test gap between rich students and poor students has continued to widen (the appendices to this paper are available at <http://cepa.stanford.edu/sites/default/files/reardon%20whither%20opportunity%20appendix.pdf>). However, since the black-white test gap in Alabama remains substantial, as Roig-Franzia reports, it may indeed be remediable by precisely the sort of increased funding to troubled districts that often results from school finance litigation (as, say, in New Jersey). Such funding increases do appear to bear fruit: in a recent paper, Michigan State economist Leslie Papke found that "increases in spending have nontrivial, statistically significant effects on math test pass rates, and the effects are largest for schools with initially poor performance." 89 *Journal of Public Economics* 821 (2005).

5.3 REMEDIES AND PROSPECTS

As we enter the second decade of the 21st century, it appears that the great “third wave” of adequacy-based school finance lawsuits that commenced in 1989 has crested and begun to recede.

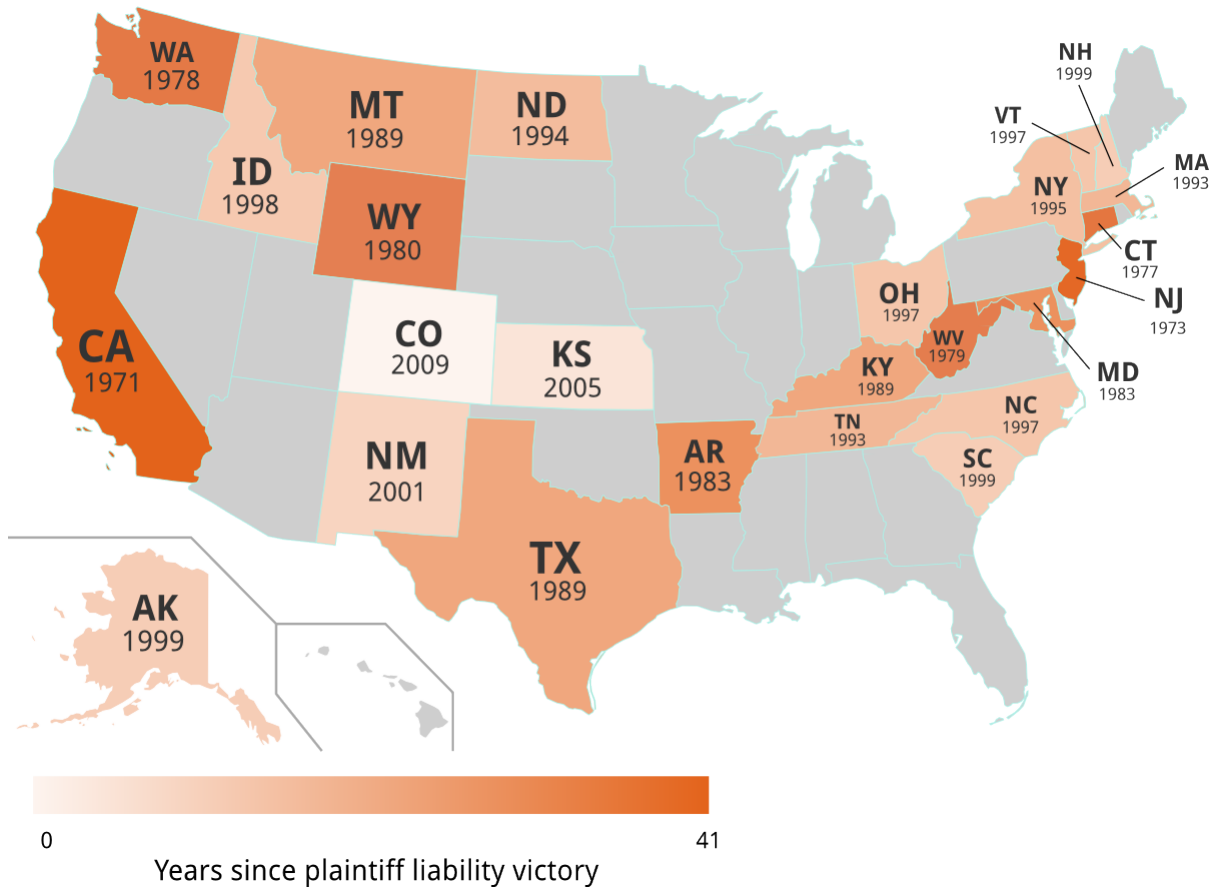


Figure 5 - Chronological Distribution of School Funding Decisions⁷⁴

The majority of decisions are clustered between 1989 and 1999; since 2001, only the supreme courts of Colorado and Kansas have declared their systems of public school finance to be unconstitutional, in both cases owing to “adequacy” arguments.⁷⁵ The first ten years of this

⁷⁴ Source: Westlaw (West Publishing).

⁷⁵ *Montoy v. State*, 278 Kansas 769 (2005) (holding that state’s funding formula failed to provide adequate resources for to enable a suitable education for students in middle and large sized districts with a high number of “at-risk”

decade have also seen the termination of state supreme court jurisdiction over long-running and high-profile cases in West Virginia and Massachusetts.⁷⁶ Furthermore, both New York and New Jersey struggled to implement the mandates of their supreme courts; the New York legislature simply could not meet a \$5 billion shortfall, while only a surprising revenue surplus staved off a serious separation-of-powers conflict in New Jersey.⁷⁷

It is, however, precisely this continued judicial oversight of school finance litigation that many view as the most practical means of ensuring that the funding disparities are remedied. “Personally I think there needs to be long-term oversight by the courts,” remarked Arkansas Congresswoman Joyce Elliott, “[even though] most legislators want the judges to bow out after a short term.”⁷⁸ Justice John Greaney of the Massachusetts Supreme Judicial Court, who voted with the majority in *McDuffy*, noted that “the desegregation cases have been going on since 1950...and Sandra Day O’Connor, before she stepped down, noted that they couldn’t go on forever, but they should go on for another twenty-five years...[so] you’re talking about fifty years of court involvement in affirmative action...and I think you’re talking about similar periods in these education cases.”⁷⁹ Michael Rebell, the executive director of the Campaign for Fiscal Equity, argued that “retention of jurisdiction in sound basic education cases until basic reforms are implemented and prove effective also is a sensible use of judicial

students); *Lobato v. State*, No. 08SC185 (2009) (holding that school funding issues are justiciable; remanded to lower court, which found for plaintiffs on “adequacy” grounds).

⁷⁶ The former ended when Governor Don Wise, who had been an expert witness for the plaintiffs in the original *Pauley v. Kelly* litigation, signed the final agreement bringing it to an end. The latter concluded when the Massachusetts Supreme Judicial Court, with a changed lineup from when the original *McDuffy v. Secretary of Education* decision was handed down in 1993, ended its jurisdiction over school finance litigation in *Hancock v. Commissioner of Education*, 443 Massachusetts 428 (2005). For a fuller discussion of *McDuffy* and *Hancock*, see Chapter 3, Section 3, subsection 2.

⁷⁷ See Chapter 3, Section 3, subsection for a discussion of the *Campaign for Fiscal Equity* litigation in New York, and Chapter 5, Section 1 for an analysis of Chris Christie’s reaction to the 2011 *Abbott* decision.

⁷⁸ Quoted in Rebell, *Courts and Kids*, p. 117.

⁷⁹ *id.*

resources...[because] decisions to terminate jurisdiction [early in the process] mean that the case has to be reopened and additional hearings held.”⁸⁰ University of Virginia law professor James Ryan wrote that “the simple truth about funding litigation is that it requires continued court involvement in order to succeed over the long run.”⁸¹

All of these individuals may well be correct: continued court oversight of funding litigation is, at present, the best and most practical means of ensuring legislative compliance. But another simple truth is that this court oversight is highly contingent, being subject to premature termination at any time; e.g., when the justices begin to “feel the heat” (as noted by both Joyce Elliott as well as the Ohio justices involved in the *DeRolph* litigation), when turnover in judicial personnel occurs, or when someone already on the bench changes his or her mind.⁸² Justice Greaney acknowledged this reality when the *Hancock* decision was announced in 2005: “Two other judges were new to the court...[and] they wanted the *McDuffy* decision overruled.”⁸³

The great possibility of the “new judicial federalism” was the opportunity for experimentation it afforded state supreme courts; however, at least in the area of school finance

⁸⁰ *id.* at 83. Of course, the retention of jurisdiction *also* ensures that courts need to keep doing most of these things, and in many cases, much more of them. In fact, the post-2001 period in school finance litigation in states has been characterized not so much by groundbreaking decisions in the *Rose* mold but the re-litigation of specific aspects of the decisions that were handed down during the 1990s (in states where plaintiffs did *not* achieve favorable results in the 1990s, the 2000s have been characterized by more defeats, typically at the trial court level). See “Legal Developments” at the Campaign for Fiscal Equity Access Network for an overview of developments during this period: <http://schoolfunding.info/legal-developments/>.

⁸¹ James K. Ryan, “Standards, Testing, and School Finance Litigation,” 86 *Texas Law Review* 1223, 1260 (2008).

⁸² Joseph C. Hutcheson, “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision,” 14 *Cornell Law Quarterly* 274, 288 (1929): “I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.” BL, a law school classmate of mine who clerked for Indiana Supreme Court Justice Brent Dickson (who, like his former colleague Randall Shepard, is a noted advocate of “judicial federalism”), described Justice Dickson’s decision-making policy as follows: “He was in no way a deep thinker, but he was an extremely staunch Republican. When he assigned me an opinion, he would tell me the result, perhaps mention a relevant case, although if there was some political aspect of it, he was always cognizant of it. *I never got the sense that the court was anything but a political court.*” (e-mail correspondence with the author, 03/10/2010, emphasis mine). Cf. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, 2002).

⁸³ Quoted in Rebell, p. 109.

litigation, this was also a significant weakness. Yesterday's holding can be qualified or overturned tomorrow, or—and perhaps this is even more important, given the ease with which most state constitutions can be amended—voted out of existence by an amendment that succeeds at the ballot box.

One possible remedy, articulated recently in the *Cornell Law Review* by Lauren Gillespie, concerns pursuing school finance litigation through the federal courts.⁸⁴ In making her argument that federal school finance litigation could constitute a “fourth wave” of this process, Gillespie highlights the possibility that “judicially manageable standards” now exist in the wake of the passage of the No Child Left Behind Act (“NCLB”).⁸⁵ Moreover, in Gillespie's opinion, something approaching “a consensus definition of an adequate education has emerged from the proliferation of state court litigation.”⁸⁶ Owing to the NCLB's goal of 100% proficiency for all American students, the “important function” of public education associated with state and local government in the *Brown* decision appears to have been “federalized.” As a result, the very foundation on which Justice Lewis Powell based his cautious holding in *Rodriguez* no longer exists, and the Court should, perforce, reevaluate this decision.

Gillespie's claims are cogent and certainly worthy of consideration, but it seems that, given the current composition of the Supreme Court, such a reevaluation is extremely unlikely. Once again, the justices' votes are what matters; without the existence of an obvious 5-4 majority

⁸⁴ Lauren Nicole Gillespie, “The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education,” 95 *Cornell Law Review* 989 (2009).

⁸⁵ *id.* at 1007. Gillespie believes that the passage of NCLB sufficiently addresses Justice Lewis Powell's concerns that “the proper goals of a system of public education...were unsettled.” *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 56 (1973). The data compiled for determining whether schools have made Adequate Yearly Progress per the terms of NCLB will “provide litigants with data and statistics illustrating the current status of public education and will further provide courts with a means by which to assess whether public schools are providing an adequate education.”

⁸⁶ *id.* With regard to the decisions that were handed down between 1989 and 1999 (which Gillespie discusses in the first part of her article), this is probably true; it is not, however, true across the United States (and certainly not true in those states where plaintiffs have not prevailed!). See Fig. 1 and Fig. 2, *supra*.

amenable to it, any notion of such a “federal strategy” is doomed to failure. If anything, the holding in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) indicates that the Court is moving toward an even more restrictive approach regarding education issues.⁸⁷ In response to a lawsuit brought by a group of parents who were challenging Seattle School District No. 1’s policy of taking race into account when assigning slots to oversubscribed high schools, Chief Justice John Roberts, writing for the majority, held that race-based programs such as this could only exist if they were narrowly tailored to serve a compelling state interest—and that a mere “racial imbalance” did not constitute such an interest.⁸⁸ Justice Anthony Kennedy concurred in the 5-4 judgment, writing separately to stress that “in the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.”⁸⁹

This is a truly ambiguous remark, and also a critical one. Since Kennedy was the swing vote in *Parents*, he had the opportunity to qualify the holding as he deemed fit. He concurred in the judgment, thus ending a program that appeared to pass constitutional muster under the Court’s prior decisions on bussing and student assignments. However, he left ajar a door that some skilled litigator might attempt to force open: Would an economically diverse student body constitute a compelling state interest? More and more data is becoming available to suggest that the most significant achievement gap is now between rich and poor students, not white and African-American students.

⁸⁷ *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

⁸⁸ *id.* at 721: “We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that ‘the Constitution is not violated by racial imbalance in the schools, without more.’” He then cited *Milliken v. Bradley*, 433 U.S. 267 (1977) as the controlling precedent for this claim.

⁸⁹ *id.* at 788. In support of this, Kennedy cited the Court’s decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that Michigan Law School’s affirmative action program did not violate Fourteenth Amendment because it was narrowly tailored to achieve the compelling interest of promoting diversity).

Class Gap Now Exceeds Black-White Math Achievement Gap from Sean Reardon (Stanford)

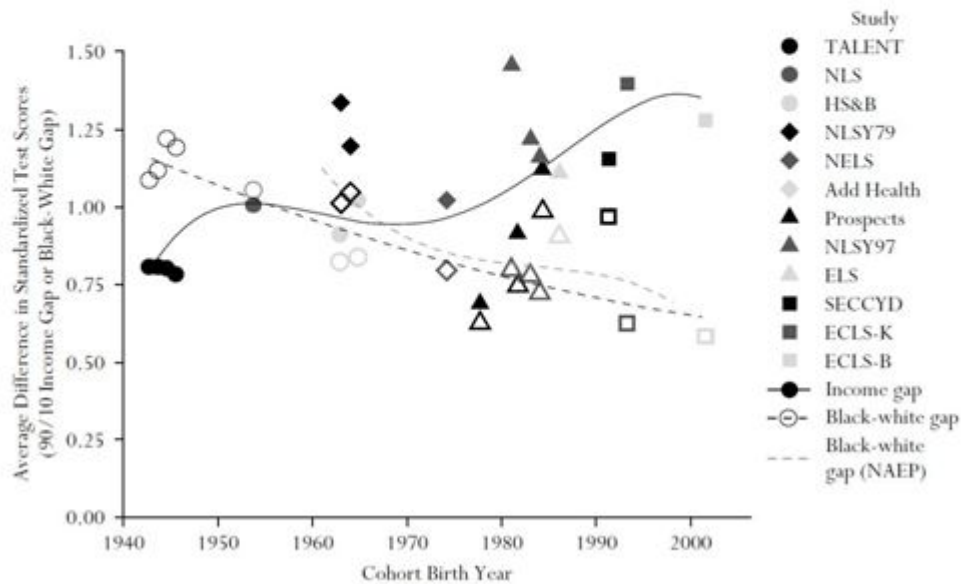


Figure 6 - Class vs. Race⁹⁰

Such an argument, perhaps coupled with Gillespie’s “federal strategy,” could lead to a reversal of *Rodriguez* and thus the dramatic restructuring of public school finance throughout the United States. Nevertheless, it too is almost entirely contingent on a change in personnel, or the emergence of a truly unusual case where Justice Kennedy finds himself compelled to vote with the four-member “liberal” bloc in accepting this approach.

I close with my own recommendation for a remedy. As I have stated repeatedly, the problem with leaving these matters up to the courts is that doing so puts the onus on a handful of elite policymakers, most of whom are either completely or partially insulated from public

⁹⁰ Source: *Social Capital Blog*, accessed at <http://socialcapital.wordpress.com/tag/sean-reardon/>. See n. 69, *supra*.

opinion by undemocratic selection methods.⁹¹ But allowing questions of school finance to be handled exclusively in state legislatures has also proved quite troublesome, given the reluctance of many legislators to fashion any remedy that either results in the spending of additional money or results in the spending of money that is not allocated exclusively to their home districts. If the Fourteenth and Fifteenth Amendments had not been ratified shortly after the Civil War, would African-American citizenship and voting rights have long survived the Compromise of 1877? During the very same congressional hearings where those issues were being debated, Charles Sumner carefully articulated the necessity of direct federal involvement in public education:

You have prescribed universal suffrage. Prescribe now universal education. *The power of Congress is the same in one case as in the other.* And you are now under an equal necessity to exercise it.⁹²

His call to action appears to have been forgotten; I did not notice it referenced in any of the various filings associated with the *Parents* decision, or even with the much earlier *Rodriguez* decision, that are accessible through the Westlaw digital archive. Given the difficulty of amending the federal constitution to create a unitary national system of public education, this would be an admittedly “pie-in-the-sky” solution.

Yet a model for its implementation exists within the United States itself: Hawaii operates a unitary state school system. Its education clause provides for “the establishment, support, and control of a statewide system of schools.”⁹³ This clause was added during the Hawaii Constitutional Convention of 1968 with the intention of creating “a single unified school system...unique within the United States” in which “the state assumes the obligation to provide

⁹¹ For more on the subject of judicial selection methods, see Chris W. Bonneau and Melinda Gann Hall, *In Defense of Judicial Elections* (Routledge, 2009). For more on the rather suspect methods by which some justices reach their decisions, see n. 78.

⁹² Congressional Globe, 40th Congress, 1st Session, March 16, 1867 (emphasis added). Accessed at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=078/llcg078.db&recNum=302>.

⁹³ Hawaii Constitution, Article X, § 6.

equal educational opportunities for our children regardless of whether they live in rich or poor areas...[and where] far-reaching policy-making decisions affecting education are conducted in Honolulu.”⁹⁴

Douglas Reed’s extensive polling of American attitudes towards equal educational opportunity revealed that, while a majority of Americans express some abstract support for equal school funding, “localism is paramount in American attitudes toward public education...[and] reforms that seek to diminish local control are much less likely to meet approval than those that do not.”⁹⁵ Thus, “when the goal of broadened educational opportunity comes with a price tag of diminished local control, there is a substantial drop in public support for the reforms.”⁹⁶ In *Milliken v. Bradley* (1974), Chief Justice Burger remarked that “no single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for the public schools and to the quality of the education process.”⁹⁷ However, all of this concern with thinking locally has caused American schools to suffer globally. Taiwan, Hong Kong, and Finland—three of the world’s four best-performing nations, as ranked by percentage of students achieving proficiency on standardized math examinations—operate unitary, national systems of public education.⁹⁸ If “global competitiveness”—the ostensible desideratum of policymakers in both major American political parties—is to be more than a buzzword, this parochial orientation

⁹⁴ 2 *Hawaii Convention of 1968* 430, 450.

⁹⁵ Douglas Reed, *On Equal Terms* (Princeton, 2002), p. 121.

⁹⁶ *id.*

⁹⁷ *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974).

⁹⁸ The fourth nation in that cluster, South Korea, operates unitary systems in each of its four provinces; given its population (48 million) and administrative complexity, it is perhaps a better analog to the United States. Germany, which ranks 15th in that same survey, uses a system of school administration similar to South Korea’s. The highest-ranking state in the survey, Massachusetts, is 17th; it is separated by 26 countries from the lowest-ranking state, Mississippi. See “Miseducation Nation,” an interactive data presentation at *The Atlantic Online*: <http://www.theatlantic.com/national/archive/2010/11/your-child-left-behind/66069/>.

must be overcome. However unlikely its ratification, a constitutional amendment authorizing the creation of a national school system would remove that particular obstacle.

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